Supreme Court, U.S.
FILED
APR 06 2007
OFFICE OF THE CLERK

No. 061347

In The Supreme Court of the United States

JAMES M. DUFF,
WILLIAM E. STRATTON,
AND
TERRENCE DOLAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

Terence H. Campbell
COTSIRILOS, TIGHE & STREICKER
33 North Dearborn, Suite 600
Chicago, Illinois 60602

(312) 263-0345

Counsel of Record for Petitioner James M. Duff

April, 2007

See Reverse Side for Additional Counsel of Record

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-3252

Michael D. Sher
NEAL, GERBER & EISENBERG
Two North LaSalle Street, Suite 2300
Chicago, Illinois 60602

(312) 269-8085

Counsel of Record for Petitioner William E. Stratton

Thomas Anthony Durkin
DURKIN & ROBERTS
53 West Jackson Boulevard, Suite 615
Chicago, Illinois 60604

(312) 981-0123

Counsel of Record for Petitioner Terrence Dolan

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

1. Where an applicant for participation in a city's affirmative action contracting program, intended to benefit women-owned and minority-owned businesses, gains acceptance into that program through deception, but without any intended or potential economic harm to the city, is there a deprivation of money or property as required for violation of the federal mail fraud statute?

2. Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. Did the lower courts err in concluding that there was a "loss," as that term is defined in the Guidelines, when there was no monetary loss or pecuniary harm to the victim City of Chicago?

LIST OF PARTIES

Petitioners, James M. Duff, William E. Stratton and Terrence Dolan, were defendants in the District Court and appellants in the Court of Appeals. Respondent, who was the plaintiff in the District Court and appellee in the Court of Appeals, is the United States. Also defendants in the District Court were Edward Wisniewski, John J. Leahy and Starling Alexander. Mr. Leahy also was an appellant in the Court of Appeals. Neither Mr. Wisniewski nor Mr. Leahy are petitioners herein. Mr. Alexander was acquitted at trial by the jury.

TABLE OF CONTENTS

Questions Presented For Review i

List of Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement 2

Charges in the Indictment 2

Proceedings in the District Court 4

The Court of Appeals' Ruling 5

Reasons for Granting the Writ 6

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *MCNALLY*, WHICH HOLDS THAT THERE CAN BE NO MAIL FRAUD WITHOUT THE INTENDED DEPRIVATION OF MONEY OR PROPERTY 8

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' DECISIONS REGARDING WHETHER THE "RIGHT TO CONTROL SPENDING," WITHOUT ANY INTENDED OR POTENTIAL PECUNIARY INJURY, IS A PROPERTY INTEREST WHICH CAN SUPPORT A § 1341 CHARGE 12

A. The Majority of Circuits Which Have Considered the Question Have Held that the "Right to Control Spending" Is Not "Property" Under the Mail Fraud Statute 12

B. The Seventh and Eighth Circuits Have Held that the "Right to Control Spending" Is "Property" Under § 1341 15

C. Resolution of this Conflict Among Circuits Is Important 15

III. THE WITHIN-GUIDELINES SENTENCE CANNOT BE TREATED AS PRESUMPTIVELY "REASONABLE" UNDER *BOOKER* 21

A. Background 21

B. The Sentencing Guidelines Cannot Be Given a "Presumption of Reasonableness" When Assessing the Reasonableness of a Sentence 22

IV. WHETHER MERELY "ADVISORY" OR "PRESUMPTIVELY REASONABLE," THE SENTENCING GUIDELINES MUST BE CALCULATED ACCURATELY TO COMPLY WITH DUE PROCESS, AND "LOSS" UNDER THE GUIDELINES CAN INCLUDE ONLY "MONETARY LOSS TO THE VICTIM," AND NOT "GAIN TO THE DEFENDANT" WHEN THERE IS NO LOSS 24

A. A Defendant's Sentencing Guideline Calculation Cannot Be Enhanced for "Loss" Under U.S.S.G. § 2B1.1 When There Is No Monetary Loss or Pecuniary Harm to the Alleged Victim 25

B. The City's MBE/WBE Program Is Not a "Government Benefit Program" 26

Conclusion 30

TABLE OF AUTHORITIES

CASES

Claiborne v. United States, 439 F.3d 479 (8th Cir. 2006) 23

Cleveland v. United States, 531 U.S. 12, 20 (2000) 9

Evans v. United States, 504 U.S. 255 (1992) 10

Fasulo v. United States, 272 U.S. 620 (1926) 10

McNally v. United States, 483 U.S. 350 (1987) 6, 7, 8 9,10

United States v. Aginsky, 165 F.3d 15 (2d Cir. 1998) 28

United States v. Alonzo, 435 F.3d 551 (5th Cir. 2006) 22

United States v. Barnes, 117 F.3d 328 (7th Cir. 1997) 28

United States v. Booker, 543 U.S. 220 (2005) 22, 23, 24

United States v. Brothers Construction, 219 F.3d 300 (4th Cir. 2000) 26

United States v. Bruchhausen, 977 F.2d 464 (9th Cir. 1992) 12, 14, 15

United States v. Carty, 453 F.3d 1214 (9th Cir. 2006) 23

United States v. Cheng, 96 F.3d 654 (2d Cir. 1996) 28

United States v. Claiborne, 127 S.Ct. 551 (U.S. Nov. 3, 2006) 23

United States v. Cooper, 437 F.3d 324 (3d Cir. 2006) 23

United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000) 28

United States v. Dorcely, 454 F.3d 366 (D.C. Cir. 2006) 22
United States v. Duff, 336 F. Supp. 2d 852 (N.D. Ill. 2004) 4
United States v. Evans, 844 F.2d 36 (2d Cir. 1988) 12, 13
United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006) 23
United States v. Granberry, 908 F.2d 278 (8th Cir. 1990) 12, 15
United States v. Green, 436 F.3d 449 (4th Cir. 2006) 22
United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc) 23
United States v. Kristl, 437 F.3d. 1050 (10th Cir. 2006) 22
United States v. Lanier, 520 U.S. 259 (1997) 9
United States v. Leahy, 464 F.3d 773 (7th Cir. 2006) 6, 9
United States v. Lewis, 436 F.3d 939 (8th Cir. 2006) 22
United States v. Lopez, 514 U.S. 549 (1995) 17
United States v. Maze, 414 U.S. 395 (1974) 10
United States v. Mazzei, 521 F.2d 639, 656 (3d Cir. 1975) 10
United States v. Mittelstaedt, 31 F.3d 1208 (2d Cir. 1994) 12, 13
United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 22
United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970) 12, 13

United States v. Rita, 177 Fed. Appx. 357 (4th Cir. 2006), cert. granted, 127 S.Ct. 551 (Nov. 3, 2006) (No. 06-5754) 23

United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) 28

United States v. Starr, 816 F.2d 94 (2d Cir. 1987) 12, 13

United States v. Staten, 466 F.3d 708 (9th Cir. 2006) 24

United States v. Villazan, Case No. 05 CR 792, 2007 WL 541950 (N.D. Ill. February 15, 2007) 9

United States v. Walters, 997 F.2d 1219 (7th Cir. 1993) 10

United States v. Williams, 436 F.3d 706 (6th Cir. 2006) 22

United States v. Zauber, 857 F.2d 137 (3d Cir. 1988) 12, 14

STATUTES

FEDERAL

18 U.S.C. § 1341 ..... *passim*

18 U.S.C. § 3231 4

18 U.S.C. § 3553(a) 23, 24

28 U.S.C. § 1254(1) 2

STATE

Alabama (Minority Business Enterprise Application) (www.adeca.alabama.gov/C15/0MBE/default.aspx) 19

CAL. PUB. UTIL. CODE §8285 (West 2007) 19

CONN. GEN. STAT. §46a-56 (1995) 19
FLA. STAT. §287.094 (2000) 19
GA. CODE. ANN. §50-5-133 (West 2006)..... 19
720 ILL. COMP. STAT. ANN. 5/17-1 (2003) 17, 18
720 ILL. COMP. STAT. ANN. 5/17-29 (West Supp. 2006).....17, 18
720 ILL. COMP. STAT. ANN. 5/3-4 (c)(1) (2002) 19
720 ILL. COMP. STAT. ANN. 5/33E-14 (2003)..... 18
730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(5) (1997).....18, 19
730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(6) (1997)..... 18
730 ILL. COMP. STAT. ANN. 5/5-8-3(a)(1) (1997)..... 18
730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(1) (West Supp. 2006).....18, 19
730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(2) (West Supp. 2006)..... 18
IND. CODE §35-43-5-9 (2006)..... 19
ANN LA. REV. STAT.. §39:1993 (1992)..... 19
MD. CODE ANN., State Fin. & Proc.§14-308 (West 2001)..... 19
MASS. GEN. LAWS. ch. 23A, §44 (2004)..... 19
MISS. CODE ANN. § 57-69-5 (2006)..... 19
MO. CODE REGS. ANN. Tit. 1, § 10-17.040 (2000)..... 19
N.J. STAT. ANN. §40A:11-47 (1986)..... 19
N.Y. EXEC. LAW §310 (1988)..... 19
OHIO REV. CODE ANN. §122.83 (West 2005) 19
18 PA. CONS. STAT. §4107.2 (1984) 19
Tennessee (Exec. Order No. 14, Dec. 8, 2003) (www.state.tn.us/sos/pub/execorders/exec-orders-bred14.pdf) 19
VA. CODE ANN. §18.2-213.1 (West 2006)..... 19

WASH. REV. CODE §39.19.080 (1987) 19
WIS. ADMIN. CODE COMM. § 105.1-105.24 (1997) 19

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. §2B1.1 .....2, 25, 26, 27
U.S.S.G. §2B1.1, Application Note 3(A)(i)..... 2, 25
U.S.S.G. §2B1.1, Application Note 3(A)(iii) 2, 25
U.S.S.G. §2B1.1, Application Note 3(B)..... 2, 26
U.S.S.G. §2B1.1, Application Note 3(F)(ii) 2, 26, 27

MISCELLANEOUS

Nirav Shah, *Mail and Wire Fraud*, 40 Am. Crim. L. Rev. 825, 827 (2003)..... 16

Peter J. Henning, *Maybe it Should Just be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435, 437 (1994-1995)..... 16

John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 126 (1981)..... 20

Petitioners, James M. Duff, William E. Stratton and Terrence Dolan, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 4, 2006 (petition for rehearing *en banc* denied on January 8, 2007).

OPINIONS BELOW

The order denying the petition for rehearing *en banc* is unreported and is reproduced in the Appendix at pp. A-1-A-2. The panel opinion rendered by Ripple, J., Manion, J. and Sykes, J., affirming, in relevant part, petitioners' convictions is reported at 464 F.3d 773 and is reproduced in the Appendix at pp. B-1-B-55. Petitioners' judgment and conviction orders are unreported and are reproduced in the Appendix at pp. C-1-C-14 (Dolan), D-1-D-23 (Duff), and E-1-E-20 (Stratton). The decision of the District Court, Bucklo, J., regarding petitioner Duff's sentencing is reported at 371 F.Supp.2d 959 and is reproduced in the Appendix at pp. D-24-D-36. The order of the District Court denying petitioners' post-trial motions is unreported and is reproduced in the Appendix at p. F-1. The decision of the District Court denying petitioners' motion to dismiss certain counts of the indictment, based on its holding that the City of Chicago's right to control its spending is a property interest as contemplated by the federal mail fraud statute, 18 U.S.C. § 1341, is reported at 336 F.Supp.2d 852 and is reproduced in the Appendix at pp. H-1-H-15. The minute order of the District Court denying petitioners'

motion to reconsider this ruling is unreported and is reproduced in the Appendix at p. G-1 – G-2.

JURISDICTION

The judgment of the District Court was entered on June 1, 2005. The judgment of the Court of Appeals was entered on October 4, 2006. Petitioners' timely petition for rehearing *en banc* was denied on January 8, 2007. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal mail fraud statute, 18 U.S.C. § 1341, is reproduced in the Appendix at p. I-1.

Application Notes 3(A)(i), 3(A)(iii), 3(B) and 3(F)(ii) to United States Sentencing Guidelines §2B1.1 are reproduced in the Appendix at J-1.

STATEMENT

Charges in the Indictment

The mail fraud counts at issue (Counts Two through Fifteen of the indictment) charged petitioners with participating in a scheme to defraud the City of Chicago ("City") through use of fraudulently obtained minority-owned ("MBE") and women-owned ("WBE") business enterprise certifications. Duff, a white male, was charged with having falsely represented that two companies controlled by him were actually operated by a woman and a minority in order to gain certification as a WBE and MBE, respectively. Stratton, an African-American male, was

charged with fraudulently representing to the City that he was the owner and operator of Remedial Environmental Manpower ("REM"), when REM actually was controlled by Duff. The indictment alleged that Stratton and Duff participated in a scheme to defraud the City through the use of REM's fraudulently obtained MBE certification, and to obtain by fraud a sub-contract with Waste Management relating to Waste Management's four contracts with the City (one for each of four waste recycling centers) for the City's "Blue Bag" recycling program. Each of those four contracts, negotiated and executed before the REM sub-contract, provided for payment by the City to Waste Management based upon fixed unit prices, which were unaffected by the REM sub-contract. Duff and Dolan also were charged with mail fraud in connection with City contracts and sub-contracts with Windy City Maintenance ("WCM"), an improperly certified WBE. There was no dispute that WCM and REM provided all services for which the City contracted and paid, or that the City paid any more for those services as a result of the charged scheme. The mail fraud charges provided the foundation for adding money laundering charges that identified the mail fraud as the "specified unlawful activity." The mail fraud and money laundering offenses, in turn, were alleged as predicate acts of racketeering activity to support a RICO conspiracy count.

Proceedings in the District Court

Jurisdiction of the District Court was based on 18 U.S.C. §3231.

Petitioners moved to dismiss the mail fraud counts relating to the MBE/WBE scheme because those counts failed to allege any intended deprivation of money or property of the City resulting from petitioners' conduct, and therefore failed to allege the requisite intent necessary to support a charge of mail fraud under 18 U.S.C. § 1341. In response, the government argued that the City's interest in controlling to whom its MBE/WBE contract money is paid is a property interest which supports a conviction under § 1341. The District Court embraced this "right-to-control-spending" theory and denied petitioners' motion to dismiss and subsequent motion for reconsideration. Apx. H-1-H-15, G-1. *United States v. Duff*, 336 F. Supp. 2d 852, 855-56 (N.D. Ill. 2004).

Prior to trial, Duff pleaded guilty, but reserved his right to challenge on appeal the legal sufficiency of the mail fraud counts. Stratton (and three other defendants) proceeded to trial, where he continued to assert that the mail fraud counts were legally insufficient. Following a four-week trial, the jury returned a guilty verdict as to Stratton on the mail fraud counts and all other counts in which he was charged (with the exception of a single mail fraud count relating to a second and distinct scheme charged).

At the sentencing hearing for Duff and Stratton, the District Court concluded that there was a "monetary loss," as defined by the Sentencing Guidelines, to the City as a result of petitioners' MBE/WBE scheme. The District Court held that the "loss" was the amount of gross profits made by Duff's two companies on the contracts and sub-contracts resulting from their certification for participation in the City's MBE/WBE Program — an amount in excess of $10 million — even though the City received all of the services for which it contracted, which were provided by petitioners' companies, at prices determined by the market, and it paid no more for those services as a result of the scheme. Apx. D-24-D-36.

Duff and Stratton appealed their convictions and sentences.

Due to circumstances related to his health, Dolan was unable to be tried with his co-defendants. Following their trial, Dolan entered a plea agreement, reserving his right to challenge on appeal the legal sufficiency of the mail fraud counts. Dolan's appeal was consolidated with Stratton's and Duff's.

The Court of Appeals' Ruling

On appeal, petitioners renewed their argument that the mail fraud counts are legally insufficient because they fail to charge, and the government at trial failed to prove: (1) that petitioners acted with the requisite intent; or (2) the potential or actual deprivation of any money or property

interest of the City as a result of the alleged MBE/WBE scheme. The Court of Appeals affirmed petitioners' convictions, tacitly embracing the "right-to-control-spending" theory of mail fraud advanced by the government, and denied petitioners' petition for rehearing *en banc*. Apx. A-1-A-2, B-1-B-55. *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below conflicts with the decision of this Court in *McNally v. United States*, 483 U.S. 350 (1987), holding that a conviction under § 1341 requires proof of a scheme calculated to deprive another of money or property, not merely an intangible right. The decision below merits review because it results in an unwarranted expansion of the scope of the federal mail fraud statute, beyond the limits prescribed by Congress and articulated by *McNally*. This expansive application of the statute is capable of repetition in countless future prosecutions under § 1341, sweeping within its scope conduct not proscribed by that act. The question raised also implicates the proper role of the federal courts in interpreting criminal statutes.

Certiorari also should be granted because the courts of appeals are divided on the question whether the "right to control spending" is "property" under § 1341. While the Eighth Circuit has recognized the right to control spending as a property interest, as did the District Court and Court of

Appeals below, the Second, Third and Ninth Circuits have rejected the view that such an interest is "property" under § 1341. It is important to resolve this split in the courts of appeals because the decisions of the Eighth Circuit and the Seventh Circuit in this case raise concerns related to federalism. Specifically, if a city's intangible "right to control spending," standing alone, is a property interest under the federal mail fraud statute, then any misrepresentation which causes a unit of local or state government to pay for necessary goods and services in a manner that does not promote a chosen regulatory policy (such as steering business to minorities and women) can support federal felony charges, regardless that the goods and services were, in fact, received and there was no potential or actual monetary loss to the state or municipality. *See McNally*, 483 U.S. 350. Such an interpretation of § 1341 allows the federal government to prosecute schemes that have nothing whatsoever to do with federal interests, and which are otherwise punishable by local and/or state law. Given the number of affirmative action programs across the nation similar to the one involved in this case, the question presented here, involving the distinction between property and intangible rights under § 1341, is likely to recur.

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *MCNALLY*, WHICH HOLDS THAT THERE CAN BE NO MAIL FRAUD WITHOUT THE INTENDED DEPRIVATION OF MONEY OR PROPERTY.

The *McNally* Court provided guidance regarding the outer boundaries of the federal mail fraud statute, correcting decades of unwarranted expansion of the statute by the Courts of Appeals, by holding that § 1341 is "limited in scope to the protection of property rights" and does not proscribe schemes merely implicating "intangible rights." 483 U.S. at 360. The *McNally* defendants' convictions were reversed because the jury instructions there permitted conviction for a violation of § 1341 for depriving the state of something other than "money or property." *Id.* at 357-59. In reversing the convictions, *McNally* held that § 1341 requires allegation and proof of a scheme calculated to deprive another of money or property, not merely of an intangible right. *Id.* at 360.

In this case, the indictment did not allege, and the government did not prove at trial, conduct by any of the petitioners which was calculated to deprive the City of Chicago of "money or property." Here, as in *McNally*, there was no possibility of pecuniary loss to the City, given the bidding processes employed by the City or the structure of the contracts and sub-contracts involved. As in *McNally*, it was neither charged nor proved that "in the

absence of the alleged scheme the [City] would have paid a lower [price] or secured better [services]....Indeed, the [money paid for these same services] would have been paid to some [company]." 483 U.S. at 360. The facts of this case conclusively demonstrate that, at the very most, petitioners intended by their scheme to deprive the City of its regulatory interest in promoting its MBE/WBE set-aside program through the spending of its funds to promote that interest. This regulatory interest is not "money or property" under § 1341. *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (holding that a purely regulatory interest is not a property interest under § 1341.) The decision of the panel affirming petitioners' convictions under § 1341 is, as a result, in direct conflict with *McNally* and should be reviewed.[1]

The decision below also results from an unwarranted departure by the Seventh Circuit from its proper function in interpreting a criminal statute. "Federal crimes are defined by Congress, not the courts..." *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (citations omitted). "[F]ederal judges are not free to devise new crimes to meet

---

[1] The need for review is particularly urgent given that the decision below already has been relied upon by at least one lower court to sustain mail fraud charges similar to those faced by petitioners here. *United States v. Villazan*, Case No. 05 CR 792, 2007 WL 541950, *5 (N.D. Ill. February 15, 2007), citing *Leahy*, 464 F.3d 788 ("Cook County's right to control its own spending is not a regulatory interest but a property interest.").

the occasion... 'Courts must resist th[e] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government.'" *Evans v. United States,* 504 U.S. 255, 295 (1992) (Thomas, J. dissenting), quoting *United States v. Mazzei*, 521 F.2d 639, 656 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting) (alteration in original). Not every deception is actionable as federal mail fraud. *United States v. Walters*, 997 F.2d 1219, 1223 (7th Cir. 1993). "If the Federal Government is to engage in combat against fraudulent schemes not covered by the [mail fraud] statute, it must do so at the initiative of Congress...." *United States v. Maze*, 414 U.S. 395, 405 n. 10 (1974). Indeed, the rule of lenity, which proscribes constructive offenses and teaches that a case must be plainly within a statute in order for a defendant to be punished, requires as much. *McNally*, 483 U.S. at 359-60, citing *Fasulo v. United States*, 272 U.S. 620, 629 (1926).

Here, the Seventh Circuit decided that the City's right to control the spending of its funds is a property interest and that petitioners' intent to deprive the City of that interest supports their conviction under the federal mail fraud statute, even where there was no potential for economic harm to the City as a result of petitioners' scheme. This concept finds no support in the law of property or in the language or purpose of the federal mail fraud statute. It is, in essence, a creation of the court below, tailored to fit the facts of this case, where it is

indisputable that the City was not (and could not have been) deprived of "money or property" as a result of petitioners' conduct, and that petitioners never intended to deprive the City of property -- only to obtain certifications for participation in a program for which their businesses did not qualify. Judicial legislation of this sort is improper, and the decision below therefore deserves this Court's attention.

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' DECISIONS REGARDING WHETHER THE "RIGHT TO CONTROL SPENDING," WITHOUT ANY INTENDED OR POTENTIAL PECUNIARY INJURY, IS A PROPERTY INTEREST WHICH CAN SUPPORT A § 1341 CHARGE

There is now a clearly delineated conflict among the Courts of Appeals regarding whether the mere right to control spending, without any intended or accompanying risk of pecuniary harm, is a property interest for purposes of § 1341, with the Seventh and Eighth Circuits on one side, and the Second, Third and Ninth Circuits squarely on the other.

A. The Majority of Circuits Which Have Considered the Question Have Held that the "Right to Control Spending" Is Not "Property" Under the Mail Fraud Statute.

In holding that the City's so-called "right to control spending" is a property interest under the mail fraud statute, even without any concomitant risk of economic harm to the City, the decision below joins in the Eighth Circuit's construction of § 1341, *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), and thereby conflicts directly with decisions of the Courts of Appeals for the Second, Third and Ninth Circuits. *See United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988), *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), and *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). None of these authorities from other circuits was addressed by the Seventh Circuit's decision in this case, even though all were cited by petitioners in that court in support of their appeal.

In *Mittelstaedt*, the Second Circuit recognized that to convict under § 1341, the government must prove an intended deprivation of a property interest, not merely the loss of some metaphysical entitlement to control to whom one's money is paid. 31 F.3d 1208. One of the defendants in that case served as a consulting engineer for two Long Island, New York communities "and abused his influence

with local government on zoning and planning matters by engaging in real estate projects there, using partners [who were his co-defendants] to conceal his participation." *Id.* at 1210. This allowed him to "misappropriate information, and to influence planning boards improperly in respect of projects in which he had a secret interest." *Id.* at 1211. But misappropriation of information and the engineer's repeated deception of the municipalities for which he worked did not, nor was it intended to result in any property loss to the communities, *id.* at 1212-1214, and therefore could not support his mail fraud convictions.

Similarly, in *Regent*, the defendants made false representations to customers in order to induce them to buy defendants' merchandise. 421 F.2d at 1176. The Second Circuit held that the defendants intended to deceive the customers, but not to defraud them. *Id.* at 1182. The customers received the goods ordered at the promised prices and suffered no actual loss of money or property, nor was any such loss intended. Because there was no scheme to deprive those customers of money or property, there was no mail fraud. *Id.* This principle has been consistently reaffirmed by the Second Circuit. See *Starr*, 816 F.2d at 99 (frustration of the customers' right to control their spending did not result in any violation of § 1341, even though defendants received customers' payments as a result of the scheme); *Evans*, 844 F.2d at 37, 42 (defendants' deception, which gained them governmental approval for arms sales, could not support mail fraud conviction because

government's right to control future arms sales is not a property right).

The Third Circuit likewise has held that the power to control decisions regarding a pension fund's investments is not "money or property" under the mail fraud statute. In *Zauber*, the defendants, trustees of a pension fund and the fund's general counsel, schemed to direct the fund to invest in enterprises in which the defendants were financially interested. 857 F.2d at 140-42. Reversing the defendants' mail fraud convictions, the Third Circuit held that deprivation of control over how the pension fund's money was invested did not constitute an actual loss of the fund's money or property for purposes of § 1341, and scheming to deprive the fund only of that intangible right was not a scheme to deprive another of money or property. *Id.* at 146-48.

The Ninth Circuit is also in accord with the Second and Third Circuits. In *Bruchhausen*, the alleged victims, manufacturers of military equipment and technology, sold that technology to the defendant based on his representation that the regulated equipment and technology would remain in the United States, when in fact the defendant was reselling it to Soviet-Bloc countries. 977 F.2d at 466. While the deceived manufacturers might well have refused to enter into the contracts with the defendant had they not been misled by the defendant's misrepresentations, the Ninth Circuit held that the mail fraud charge could not be sustained because it was not the object of the scheme to

deprive the manufacturers of any money or property. *Id.* at 467-68. To the contrary, "the manufacturers received the full sale price for their products; they clearly suffered no monetary loss." *Id.* at 467.

B. The Seventh and Eighth Circuits Have Held that the "Right to Control Spending" Is "Property" Under § 1341.

The Seventh Circuit (in this case) and the Eighth Circuit have held that the "right to control spending" is a property interest, even where there is no possibility of economic harm to the victim of the scheme. *Granberry*, 908 F.2d 278. The defendant in *Granberry* failed to disclose on his application for a Missouri school-bus-operator permit that he had a prior conviction for first-degree murder. After obtaining that permit, he applied to a school district for a job as a bus driver, again concealing his murder conviction, and was hired. While the school district received the bus-driving services for which it paid, the Eighth Circuit held that the school district was "deprived of money in the very elementary sense that its money has gone to a person who would not have received it if all of the facts had been known." 908 F.2d at 280.

C. Resolution of this Conflict Among Circuits Is Important.

Determining whether the "right to control spending" is a property interest for purposes of § 1341, where there is no intended deprivation of property and no risk of economic

harm to the putative victim of the scheme, is important given federal prosecutors' well-known fondness for the statute, the consequences of the application of the statute as a foundation for other federal offenses -- such as money laundering and RICO -- and the sheer number of affirmative action programs in states and cities across the nation similar to the one at issue in the present case.

The federal mail fraud statute historically has been used to prosecute a wide range of frauds, and has been called a federal prosecutor's "first line of defense."[2] Indeed, the statute has been used to "extend federal jurisdiction to crimes traditionally prosecuted only at the state and local level."[3] Not only does § 1341 expand the ability of the federal government to prosecute certain frauds, it creates the potential for imposition of significant fines and periods of incarceration since a mail fraud offense is a predicate act for RICO and money laundering.[4]

The expansion of the federal mail fraud statute to apply to conduct relating solely to state and local affirmative action set-aside programs, which conduct does not and cannot result in any pecuniary harm to state or local government and is punishable under state law, is

---

[2] Nirav Shah, *Mail and Wire Fraud*, 40 Am. Crim. L. Rev. 825, 827 (2003).

[3] Peter J. Henning, *Maybe it Should Just be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435, 437 (1994-1995).

[4] *Id.*

problematic because it is inconsistent with the traditional role of the states in enforcing the criminal law. *United States v. Lopez*, 514 U.S. 549 (1995). The present case demonstrates why expansion of § 1341 to embrace the intangible right to control spending is unwarranted and potentially of severe consequence to defendants and federal, state and local governments.

Here, petitioners were charged with falsifying information on applications for certification with the City's MBE/WBE Program, and in interviews relating to those applications. This conduct, affecting the City (not the federal government), was punishable under the laws of the City and of Illinois.[5] Yet, neither the City nor the state sought to prosecute petitioners for their conduct. The federal government did so, and with grave ramifications for petitioners. Instead of being prosecuted for falsification of information on their applications, petitioners were prosecuted for federal mail fraud, money laundering and RICO conspiracy. As a result, petitioners did not face the penalties specifically prescribed by Illinois for their conduct; they faced (and now are enduring) the

---

[5] *See* 720 ILL. COMP. STAT. ANN. 5/17-1 (2003) ("Deceptive Trade Practices"); 720 ILL. COMP. STAT. ANN. 5/33E-14 (2003) ("False Statements on Vendor Applications"); 720 ILL. COMP. STAT. ANN. 5/17-29 (West. Supp. 2006) ("Businesses Owned By Minorities, Females, and Persons with Disabilities; Fraudulent Contracts With Governmental Units") (effective January 1, 2006).

exponentially greater penalties associated with the aforementioned federal crimes.[6]

Petitioners were not the only ones affected by the federalization of the scheme in this case. The federal government incurred substantial costs associated with the investigation of the scheme against the City, as well as those incurred in the lengthy trial of this case. Prosecution of the scheme under the state and local laws enacted to apply to such crimes effectively was pre-empted by the federal prosecution.[7] The unwarranted expansion of § 1341 indeed had consequences for all involved in the case below.

---

[6] Mr. Duff was sentenced to a term of imprisonment of 118 months and ordered to make restitution in the amount of $12,026,582.02; Mr. Stratton was sentenced to 70 months and ordered to make restitution in the amount of $7,370,739; Mr. Dolan was sentenced to 21 months and ordered to make restitution in the amount of $20,000. The conduct charged also was proscribed by Illinois law, 720 ILL. COMP. STAT. ANN. 5/33E-14 (2003), a Class 3 felony with a maximum sentence of a term of imprisonment of not less than two years, not more than five years and a fine of $25,000, 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(6) (1997), 730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(1) (West Supp. 2006), and/or 720 ILL. COMP. STAT. ANN. 5/17-1 (2003), a Class A misdemeanor with a maximum sentence of a term of imprisonment of less than one year and a fine of $2,500. 730 ILL. COMP. STAT. ANN. 5/5-8-3(a)(1) (1997), 730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(2) (West Supp. 2006).

[7] In January, 2006, the State of Illinois enacted legislation specifically aimed at punishing the type of conduct for which petitioners were convicted. *See* 720 ILL. COMP. STAT. ANN. 5/17-29 (West Supp. 2006). Violation of this statute is a Class 2 Felony with a maximum sentence

Moreover, petitioners' case is unlikely to be an isolated one. At least twenty states have MBE/WBE set-aside programs, fourteen of which (including Illinois) make it unlawful to provide false information in the certification process and provide penalties for that conduct.[8] If the

---

of a term of imprisonment of not less than 3 years, not more than seven years, a fine of $25,000, and a penalty of one and one-half times the amount of the contracts fraudulently obtained. 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(5) (1997), 730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(1) (West Supp. 2006). The prior federal prosecution would effectively bar a subsequent state prosecution under this statute. 720 ILL. COMP. STAT. ANN. 5/3-4(c)(1) (2002).

[8] California(CAL. PUB. UTIL. CODE §8285 (West 2007)), Connecticut (CONN. GEN. STAT. §46a-56 (1995)), Florida (FLA. STAT. §287.094 (2000)), Georgia (GA. CODE. ANN. §50-5-133 (West 2006)), Illinois (720 ILL. COMP. STAT. ANN. 5/17-29 (West Supp. 2006)), Indiana (IND. CODE §35-43-5-9 (2006)), Louisiana (LA. REV. STAT. ANN. §39:1993 (1992)), Maryland (MD. CODE ANN., STATE FIN. & PROC.§14-308 (West 2001)), Massachusetts (MASS. GEN. LAWS. ch. 23A, §44 (2004)), New Jersey (N.J. STAT. ANN. §40A:11-47 (1986)), Ohio (OHIO REV. CODE ANN. §122.83 (West 2005)), Pennsylvania (18 PA. CONS. STAT. §4107.2 (1984)), Virginia (VA. CODE ANN. §18.2-213.1 (West 2006)) and Washington (WASH. REV. CODE §39.19.080 (1987)) impose penalties for false statements made on an application to become a certified MBE/WBE. Alabama (Minority Business Enterprise Application, *available at* http://www.adeca.alabama.gov/C15/OMBE/default.aspx), Mississippi (MISS. CODE ANN. § 57-69-5 (2006)), Missouri (MO. CODE ANN. § 57-69-5 (2006)), New York (N.Y. EXEC. LAW §310 (1988)), Tennessee (Exec. Order No. 14, Dec. 8, 2003, *available at* www.state.tn.us/sos/pub/execorders/exec-orders-bred14.pdf) and Wisconsin (WIS. ADMIN. CODE COMM. §105.1-105.24

"right to control spending," without more, is a property interest for purposes of § 1341, then virtually any alleged misrepresentation, no matter how trivial, made to secure certification pursuant to any one of these affirmative action programs could support federal felony charges. There is a direct conflict between the Seventh and Eighth Circuits on the one hand, and the Second, Third and Ninth Circuits on the other regarding whether, in the absence of any intended or potential pecuniary harm, deprivation of the right to control to whom money is paid for services rendered is a deprivation of money or property within the contemplation of § 1341. This conflict on a recurring question regarding the proper interpretation of the most oft-used federal criminal statute[9] should be resolved by this Court. For this additional reason, review of the decision below is necessary.

(1997)) have MBE/WBE affirmative action programs, but no specific penalties for false statements made on applications to those programs.

[9] John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 126 (1981) (describing the mail fraud statute as a prosecutorial catchall, and reciting the prosecutor's maxim that "when in doubt, charge mail fraud.")

III. THE WITHIN-GUIDELINES SENTENCE CANNOT BE TREATED AS PRESUMPTIVELY "REASONABLE" UNDER *BOOKER*.

A. Background

As set forth above, petitioner James Duff operated and controlled two companies, WCM and REM, which he falsely represented as being owned and controlled by a woman and a minority, respectively, so they could obtain WBE/MBE certifications from the City of Chicago. Because of these certifications, WCM and REM were able to obtain certain City contracts or sub-contracts.

While the City did not achieve its regulatory goal of steering certain contracts or sub-contracts to MBEs or WBEs, the City suffered absolutely no monetary loss as a result of petitioners' conduct. It is undisputed that Duff's companies were the low-cost provider for each of the contracts or sub-contracts at issue in the indictment and that the City, by its own admission, received "full monetary value for the money paid" under those contracts. Indeed, after fully investigating the conduct on which the prosecution here was grounded, the City's Law Department concluded:

> *The City did not suffer any monetary damage* due to the statements made in connection with the contracts awarded by the Purchasing Department [pursuant to the MBE/WBE certifications] *because*:

(1)WCM was the lowest bidder on each of those contracts; (2) WCM performed the services required by each contract; and (3) there is no evidence that the quality of its work was anything less than commendable. Therefore, the City received all the services it was due under each contract at prices which were driven by market forces. (Emphasis added).

B. The Sentencing Guidelines Cannot Be Given a "Presumption of Reasonableness" When Assessing the Reasonableness of a Sentence.

Under this Court's decision in *United States v. Booker*, sentencing courts must consider the Sentencing Guidelines, in an advisory capacity, in fashioning a "reasonable sentence." 543 U.S. 220, 259 (2005). The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and the District of Columbia Circuits have held a sentence within the advisory guideline range to be presumptively reasonable. *See United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lewis*, 436 F.3d 939, 946 (8th Cir. 2006); *United States v. Kristl*, 437 F.3d. 1050, 1054 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006). Other Circuits, including the First, Second, Third, and Ninth, do not agree that a sentence within the advisory guideline range should be treated as "presumptively

reasonable." *See United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006); and *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006).

This Court has now accepted *certiorari* in *United States v. Rita*, 177 Fed. Appx. 357 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 551 (Nov. 3, 2006) (No. 06-5754), to decide whether the advisory guideline sentence should or may be considered by the lower courts as the "presumptively reasonable" sentence.[10]

In this case, petitioners' sentences were reviewed pursuant to the Seventh Circuit's holding in *Mykytiuk* that the guideline-suggested sentence is presumptively reasonable – pursuant to factual findings made by the court by a preponderance of the evidence, and not by a jury beyond a reasonable doubt – despite the fact that there were a host of reasons counseling in favor a lower sentence

---

[10] In *Rita*, the questions on which *certiorari* was granted are: "1) Was the District Court's choice of within-Guidelines sentence reasonable? 2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005) to accord a presumption of reasonableness to within-Guidelines sentences? 3) If so, can that presumption justify a sentence imposed without an explicit analysis by the District Court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?" *Rita*, 127 S.Ct. 551. *See also*, *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, *Claiborne v. United States*, 127 S.Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5618) (similar).

under the factors set forth in § 3553(a). *See, e.g., Booker*, 543 U.S. at 313 ("Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging District Courts from sentencing outside the Guidelines range? ... Time may tell ...") (Scalia, J., dissenting). Thus, if this Court holds in *Rita* and *Claiborne* that the advisory guidelines are not entitled to a presumption of reasonableness, petitioners' sentences must be reversed and the case remanded for resentencing.

IV. WHETHER MERELY "ADVISORY" OR "PRESUMPTIVELY REASONABLE," THE SENTENCING GUIDELINES MUST BE CALCULATED ACCURATELY TO COMPLY WITH DUE PROCESS, AND "LOSS" UNDER THE GUIDELINES CAN INCLUDE ONLY "MONETARY LOSS TO THE VICTIM," AND NOT "GAIN TO THE DEFENDANT" WHEN THERE IS NO LOSS.

Whether merely advisory or presumptively reasonable, it is axiomatic that the guideline sentencing range must be calculated accurately to accord with due process. *E.g., United States v. Staten*, 466 F.3d 708, 713 (9th Cir. 2006) (citations omitted). Here, the sentencing guidelines were not calculated accurately because the Seventh Circuit and the Fourth Circuit have improperly interpreted the meaning of "loss." The interpretation of "loss" used by the Court of Appeals here added more than six years to the sentences meted out to petitioners Duff and Stratton. Moreover, the

interpretation of "loss" under the Guidelines affects virtually every federal fraud case throughout the country. Therefore, in the interest of uniformity, the definition and scope of "loss" should be resolved by this Court.

A. A Defendant's Sentencing Guideline Calculation Cannot Be Enhanced for "Loss" Under U.S.S.G. § 2B1.1 When There Is No Monetary Loss or Pecuniary Harm to the Alleged Victim.

According to the plain language of the Guidelines, if one can reasonably calculate the loss to the victim – including if the loss is zero – that loss figure is the operative figure for Guidelines purposes. Gain to the defendant cannot enhance the sentence in the absence of any economic harm to the victim. In fraud cases, the determination of "loss" under the Guidelines is governed by U.S.S.G. §2B1.1 (or its predecessor, §2F1.1). Thus, Application Note 3 to U.S.S.G. §2B1.1 states, in pertinent part:

> 3(A)(i) Actual Loss. – "Actual loss" means the reasonably foreseeable *pecuniary harm* that resulted from the offense.
>
> * * *
>
> 3(A)(iii) Pecuniary Harm. – *"Pecuniary harm" means harm that is monetary* or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include ... non-economic harm. (Emphasis added.)

U.S.S.G. §2B1.1, App.n 3 (Nov. 2006 ed.). Finally, beginning in the 2001 version of the Guidelines, Application Note 3(B) to §2B1.1 states: "Gain. – the court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." U.S.S.G. §2B1.1, App.n 3(B). The loss to the City here could reasonably be determined – it was zero.

B. The City's MBE/WBE Program Is Not a "Government Benefit Program."

Though there was no loss to the City, the District Court held that "gain to the defendant" was the proper measure of "loss" and used the gross profits earned by Duff's companies as the "loss" amount under the Guidelines. The Seventh Circuit compounded the District Court's error by finding that the "loss" was not merely the "gain" (*i.e.* gross profits) earned by those companies, but the amount of gross revenues received pursuant to the contracts without any consideration given for the value of the work performed. In holding that the full amount of the gross payments made to MBEs and WBEs in exchange for work performed under competitively bid contracts and sub-contracts constitute "government benefits" under Application Note 3(F)(ii) to the fraud Guidelines, U.S.S.G. § 2B1.1, the Seventh Circuit joined the Fourth Circuit.

In *United States v. Brothers Construction*, 219 F.3d 300 (4th Cir. 2000), the Fourth Circuit also held that contractual

payments to MBE/WBE's for work performed constitute "government benefits." *Id.* Both the Fourth Circuit's holding in *Brothers* and the Seventh Circuit's holding here ignore the very specific application notes cited above which require the sentencing court to look to the victim's "actual loss." The conclusion of the Fourth and Seventh Circuits is directly at odds with both the mandates of the Guidelines and the economic realities of this case, and it should be reviewed.

First, the "government benefits" application note relied on by the Seventh Circuit simply does not apply to cases involving arms-length, value-for-value contracts. Application Note 3(F)(ii) states:

> Government Benefits. – In a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.

U.S.S.G. 2B1.1, App.n 3(F)(ii). Thus, this application note is explicit that it is meant to apply to things such as "grants, loans, [and] entitlement programs." *Id.* Consistent with that note, in most other circuits (other than the Seventh Circuit in this case, and the Fourth Circuit in *Brothers*

Construction), the "government benefits program" application note has been applied to actual entitlement programs, such as Medicare, food stamps, grants, and federal disability payments – that is, programs in which payments or benefits are provided to individuals in need without regard to whether any goods or services of equivalent value are provided in return. *E.g., United States v. Cheng*, 96 F.3d 654 (2d Cir. 1996) (food stamps); *United States v. Dawkins*, 202 F.3d 711 (4th Cir. 2000) (federal disability benefits); *United States v. Aginsky*, 165 F.3d 15 (2d Cir. 1998) (Medicare payments); *United States v. Barnes*, 117 F.3d 328 (7th Cir. 1997) (food stamps); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (Medicare payments).

Second, entitlement programs like food stamps and Medicare payments are patently different in kind from MBE/WBE programs such as the ones at issue here and in *Brothers Construction*. The City's MBE/WBE set-aside program is an affirmative action program administered by a procurement and contracting department, not through a social service or benefits agency. Moreover, the City's set-aside program seeks to achieve a markedly different goal than entitlement programs, which essentially exist to provide for free the essentials of life to needy recipients. By contrast, the set-aside MBE/WBE Program requires qualified contractors to earn their payments by providing goods and services of equivalent value in return. It

involves competitively bid contracts in which competence, ability, and full performance are required.

This is an important question which is likely to recur with frequency given that at least 20 states have MBE/WBE set-aside programs. (See footnote 8 above.) Here, the actual loss to the City was zero, yet the Court of Appeals determined that the "loss" was the gross amount of all payments made to WCM and REM. This exponentially increased the advisory Guideline range for petitioners (to which the sentencing court gave a presumption of reasonableness), and should be reviewed by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,

TERENCE H. CAMPBELL
COTSIRILOS, TIGHE & STREICKER
33 N. Dearborn, Suite 600
Chicago, Illinois 60602
Counsel for Petitioner Duff

MICHAEL D. SHER
NEAL, GERBER & EISENBERG, LLP
Two North LaSalle Street, Suite 2300
Chicago, Illinois 60602
Counsel for Petitioner Stratton

THOMAS ANTHONY DURKIN
DURKIN & ROBERTS
53 W. Jackson Boulevard, Suite 615
Chicago, Illinois 60604
Counsel for Petitioner Dolan

APPENDIX

7TH CIRCUIT:

Order Denying Petition for Rehearing,
filed 01/08/07 ..... A1 - A2

Opinion,
filed 10/04/06 ..... B1 - B55

NORTHERN DISTRICT OF ILLINOIS:

Judgment [Dolan],
filed 02/01/06 ..... C1- C14

Judgment and Memorandum
Opinion [Duff],
filed 05/27/05 ..... D1 - D36

Judgment [Stratton],
filed 05/25/05 ..... E1 - E20

Minute Order Denying
Post-trial Motions,
filed 04/25/05 ..... F1 - F1

Minute Order Denying
Renewed Motion to Dismiss,
filed 01/10/05 ..... G1 - G3

Minute Order and
Memorandum Opinion
Denying Motion to Dismiss,
filed 09/21/04 ..... H1 - H15

APPENDIX, CONTINUED

OTHER:

18 U.S.C. § 1341 (2002) ..... I1 - I1

Relevant Application Notes
to U.S.S.G. § 2B1.1 ..... J1 - J1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 2007

Before

Hon. Kenneth F. Ripple, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Diane S. Sykes, *Circuit Judge*

Nos. 05-2639, 05-2652, 05-2692 & 06-1485	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
United States of America, *Plaintiff-Appellee,*	No. 03 CR 922
v.	Elaine E. Bucklo, *Judge.*
John J. Leahy, William E. Stratton, James M. Duff, and Terrence Dolan, *Defendants-Appellants.*	

ORDER

On consideration of the petitions for rehearing en banc filed by defendants-appellants, no judge in active service has

requested a vote on the petitions for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. The petitions are therefore **DENIED**.

---

[1]Judge Flaum and Judge Williams did not participate in the consideration of these petitions.

In the
United Sates Court of Appeals
for the Seventh Circuit

Nos. 05-2639, 05-2652, 05-2692 & 06-1485

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN J. LEAHY, WILLIAM E. STRATTON,
JAMES M. DUFF, and TERRENCE DOLAN,
Defendants- Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CR 922 — **Elaine E. Bucklo**, *Judge.*

ARGUED JUNE 9, 2006 — DECIDED OCTOBER 4, 2006

Before RIPPLE, MANION, and SYKES, *Circuit Judges.*

MANION, *Circuit Judge.* This appeal stems from James Duff's admitted, successful schemes to cheat the City of Chicago out of funds slotted for minority- and women-owned businesses and to swindle various workers compensation insurance providers out of proper premiums. Duff's expansive plots swept up many of his business associates and family members, and this appeal consolidates

a broad range of challenges (by him and them) to pleas, jury convictions, and sentences. We affirm in part and reverse in part.

I.

Two complex fraud schemes hatched by James Duff, a Chicago businessman, are at the heart of this case. Despite the significant overlap between the participants and companies that figure in the two plots, we will discuss the facts of each separately in the interest of clarity.

A. City Scheme

In 1990, the City Council of Chicago passed an ordinance to grant an advantage to select businesses owned by minorities ("MBEs") and women ("WBEs") in the award of city contract money. Specifically, Chicago's Purchasing Agent had to "establish a goal of awarding not less than 25% of the annual dollar value of all Contracts to qualified M.B.E.s and 5% of the annual dollar value of all Contracts to qualified W.B.E.s." In addition to requiring the heads of departments and agencies to work with the Purchasing Agent to meet this goal, the ordinance also contained an explicit provision setting aside certain contracts for qualified MBEs and WBEs that met "target market requirements." Companies that wished to obtain a contract with the city, but which were neither MBEs nor WBEs, had to commit to expend 25% of the value of the contract with MBEs and 5% with WBEs. The

ordinance included subcontracting as one of the various ways to fulfill this requirement. Penalties for a contractor's failure to meet the appropriate percentages ranged from liquidated damages to termination.

While the ordinance provided substantial assistance to MBEs and WBEs, it imposed heavy restrictions on which companies qualified. In particular, it limited its application based both on owner involvement in the business and the level of success achieved by the business. For a business to qualify as an MBE, one or more members of a minority group must have ownership of 51 % of the company, and one or more members of a minority group must have day-to-day management and control. The ordinance defined a WBE in like manner, substituting women for minorities. A figurehead minority or woman owner, therefore, would not be enough for certification; a member of one of these select groups must own and, for all practical purposes, run the business.

There was an additional limitation. Chicago prohibited any "Established Business" from gaining this favored status. According to the ordinance, an established business was one which, "by virtue of its size and capacity ... does not need to be a participant in the Program in order to effectuate the purposes of the Program ...." Giving further guidance, the ordinance presumed a business met this definition if it (and any affiliates) totaled $17 million in average annual gross receipts over a three-year period. This restriction indicates that Chicago was not interested in subsidizing entrenched,

successful businesses, even if the businesses were owned by women or minorities. As a former city official put it at trial, "it was a program to assist those companies to win contracts with the City in a competitive situation and become economically viable so that they, in fact, could compete as prime contractors." In other words, this was an affirmative action program whose fruits were reserved for fledgling minority and women businesses.

When Chicago passed the ordinance, James Duff, a white man, controlled numerous businesses in the city. For purposes of the present discussion, we focus our attention on two of those businesses. First, he controlled Windy City Maintenance ("Windy Maintenance"), a company providing janitorial services, which Duff incorporated in 1989. While his mother, Patricia Green Duff ("Green Duff"), was Windy Maintenance's sole shareholder, this was an empty formality as she had no real involvement with the business, exercising no control over its affairs and spending considerable time in vacation homes in Florida and Wisconsin. Duff himself actually ran Windy Maintenance, making all substantive financial and business decisions, including hiring employees and negotiating contracts. Second, Duff controlled a company named Remedial Environmental Manpower ("Remedial"), which "manage[d] and provide[d] manpower for environmental cleanup." Remedial was incorporated in 1988, and its purported owners were William Stratton ("Stratton"), who owned fifty-five percent of the stock, and Green Duff,

who owned the remaining forty-five percent. Stratton, a black man, acted as the occasional driver and companion of Duff's father, a friendship dating back to earlier union days. Stratton routinely came to the Remedial office (space shared with a number of other Duff businesses) shortly before lunch in the company of Duff's father and, while there, mainly played cards with members of the Duff family and watched television. For the early part of its existence, Remedial was more of an empty shell than a thriving concern, or as Duff himself put it, "a company that didn't work out." To the extent that Remedial was an actual company, however, Duff was in charge.

With Green Duff and Stratton in the ownership positions of these companies, Windy Maintenance and Remedial appeared, at least superficially, well-positioned to obtain WBE and MBE certification after the passage of the ordinance. Of course, for either to gain such a status, Duff would need to obscure his kingship over the companies.

Windy Maintenance was the first to try to take advantage of the ordinance. In 1991, it applied for certification as a WBE, claiming in the application that Green Duff, who used her maiden name, Patricia Green, both owned and ran the company. Green Duff repeated this representation to city officials during a subsequent certification interview, and Windy Maintenance obtained the desired certification as a WBE. Windy Maintenance retained this position for several years, with corporate officers, such as Terrence Dolan,

submitting annual renewal applications that reiterated the false description of Green Duff's role.

Windy Maintenance's certification allowed it to win lucrative contracts with Chicago and subcontracts with City contractors specifically because of its WBE status. In particular, Windy Maintenance entered into subcontracts to provide janitorial services for a terminal at O'Hare International Airport and the Harold Washington Library. Windy Maintenance also contracted directly with Chicago for similar services at the city's 911 Center and a district of the Chicago Police Department. In 1999, Windy Maintenance informed the city that it would no longer apply for WBE certification as it had reached the maximum dollar limits it could obtain under the program. Over the years in which Windy Maintenance was certified as a WBE, it obtained $37,512,279 from these contracts and subcontracts. Throughout this time, Duff was totally in charge at Windy Maintenance.

Remedial's big break came slightly later than that of its sister company. In approximately 1991, Duff was approached by James Barry, a long-time friend and business associate, to discuss providing the labor portion of a bid that Barry's company, Waste Management of Illinois ("Waste Management"), was submitting to Chicago. Chicago was looking for a company to provide construction, administration, and labor services for four new recycling centers as part of the city's Blue Bag recycling program. Of

course, Chicago's involvement meant that the winning bid had to comply with the strictures of the 1990 ordinance. Duff responded to Barry's solicitation that he could not only fulfill Waste Management's labor needs, but could do so using a company that could achieve MBE certification–Remedial. Remedial's lack of work experience did not faze Barry. He was selecting Duff, a friend and established businessman who had consistently met Barry's expectations in past projects, while getting credit for hiring an MBE. As Barry put it at trial, "it was my understanding that no matter what the ownership structure of the company would be, that I was going to continue to deal with Jimmy and rely on Jimmy to operate and control." After eventually winning the Blue Bag contract, Waste Management designated Remedial as its MBE subcontractor in its 1993 plan to the city.

Obtaining certification as an MBE turned out to be a much trickier proposition for Remedial than it had been for Windy Maintenance. In 1993, Remedial submitted its initial certification affidavit to the city's purchasing agent for approval. This application revealed that Ellen Niemeier was the sole minority shareholder and contained no references to Duff's mother, Green Duff. Duff's influence had not diminished, as Ellen Niemeier happened to be his wife. Nonetheless, the application raised a variety of concerns with the relevant Chicago officials. In particular, they had questions about the roles of Stratton and Niemeier, as well as Remedial's overall viability and independence, worries

prompted by several allusions to Duff and his companies on the application. These concerns were heightened when the city contacted clients of Remedial who indicated that they only dealt with James Duff. Faced with a variety of red flags, the city issued a preliminary denial of MBE status in 1993.

For his part, Stratton immediately and vigorously opposed this ruling in meetings and through a number of filings, including an affidavit from Duff expressly denying his involvement with Remedial. Still, the city held strong. In 1994, however, Remedial submitted an entirely new application that reported Stratton was the sole owner of the business and that removed all of the troubling references to Duff and his companies. After another review, the city changed course and approved Remedial as an MBE. Obtaining MBE status, Remedial officially became an MBE subcontractor in the city's Blue Bag program, providing the labor for Waste Management at the four recycling centers. During the life of its contract with Waste Management, Remedial received approximately $74,849,310 from the city program.

During the 1990s, money often flowed through Windy Maintenance and Remedial (and other Duff-controlled companies) to American Management and Consulting ("American"). While American was supposedly a consulting company, in actuality Duff, its owner, basically used it as a payroll company. Duff would instruct his payroll specialist to transfer money from a company like Remedial to American,

then make payments to family members and others out of that account. Moreover, Stratton and other employees would often receive and cash large checks, and, on Duff's instructions, would return the entirety of the proceeds to Duff for his use.

Duff's shenanigans eventually garnered media scrutiny, which led to a city investigation into the propriety of the certifications. In order to evade city investigators, Duff had office personnel spend weeks tutoring Green Duff so that she could give the impression that she actually ran Windy Maintenance. To complete the illusion, Duff installed Green Duff in his actual office, going so far as to change the buttons on the switchboard to reflect that the main office was hers. While Green Duff had a rocky interview with city inspectors, Duff convinced his employees and business associates to corroborate the story that she was in charge. In particular, Duff's primary insurance agent, John Leahy, told Adrienne Hiegel, an assistant state's attorney, that he met solely with Green Duff on insurance matters for Windy Maintenance and that he had no contact with Duff on these matters. The ruse worked, and Chicago's investigation faltered. Likewise, Stratton convinced city investigators he actually ran Remedial.

While the city could not pierce the conspiratorial curtain, federal investigators eventually did. As will be explained further in conjunction with the insurance scheme, in 2003, Duff, Stratton, Green Duff, and Dolan were each

indicted for offenses arising out of their actions in the city scheme.

B. Insurance Scheme

We now shift our attention to Duff's endeavors to cheat his insurers, a fraud of even longer duration. This scheme introduces yet another company controlled by Duff: Windy City Labor Service ("Windy Labor"). Windy Labor provided temporary employees to various liquor warehouses and other clients.

Before detailing the scheme, a working knowledge of the mechanics of the Illinois workers compensation system is necessary. Illinois generally requires employers to have workers compensation insurance. Because some employers with high risk histories would be unable to obtain insurance in the open, voluntary market, Illinois created an assigned risk pool to provide insurance to these businesses. While all insurance companies providing workers compensation insurance contribute to the assigned risk pool, a small subset actually administer the insurance policies in the assigned risk pool, charging higher premiums (because of higher risks) and obtaining reimbursements for their costs. A business can apply for assigned risk insurance only after receiving two rejections on the voluntary market. When a business applies, Illinois itself actually does not decide upon the carrier but farms this task out to the National Council on Compensation Insurance (the "Insurance Council"). The Insurance Council

assigns applicants to participating insurance companies and sets advisory rates for the calculation of premiums.

Premiums for workers compensation insurance are calculated using three independent factors. First, the insurance company must determine the correct classifications for the various jobs performed by the insured's employees. Each type of job has an advisory rate set by the Insurance Council, which reflects the relative riskiness of that position. The second factor is the amount of payroll in each job classification. The premium's final element is the experience modifier, a number determined by the Insurance Council that compares an employer's past claim history to the past claim history of the average employer in that job classification. If a company has a claims history that is average in its field, the experience modifier will be one. As the number of claims increases, so does the modifier (and by extension, the premium). However, an extremely high modifier, for example one reflecting double or triple the average amount of claims, might instead indicate improper classification of employees. The insurance company calculates the premium by multiplying the job classification rate by the payroll and that amount by the experience modifier.

With this background, we now examine Duff's insurance fraud. Windy Labor first applied for placement in the assigned risk market through its insurance broker, John Leahy of Leahy & Associates, in 1982. In the initial application, Leahy described Windy Labor as a company that

"will provide various labor type jobs as they arise. The work will vary, will include janitorial work, truck helpers, warehousing, bottling. It is a temporary service for labor-type work." The initial classification codes submitted–warehousing, bottling, janitorial, and truck helper employees–were consistent with this information. A report from later in the year was even more blunt in its assessment of the Windy Labor work force: "As mentioned, these are usually people out of work or skid row bums working for drinking money." The Insurance Council assigned Windy Labor to Casualty Insurance ("Casualty") as its workers compensation insurance provider.

Casualty provided Windy Labor with insurance from the assigned risk pool until 1995. During this time, Windy Labor applied annually for renewal of this insurance, sending updated payroll and classification numbers. These renewals were largely automatic between Windy Labor and the insurance provider, but Casualty continued to send Leahy & Associates copies of policies and applications. For the first few years, the classifications remained constant, but in 1985, a drastic shift occurred. The application introduced a clerical workers category and, from the start, this new classification included the largest portion of payroll, dwarfing other more established categories such as warehousing and janitorial. Again, Leahy & Associates received a copy of the policy reflecting this change from Casualty. Throughout the remainder of Windy Labor's relationship with Casualty, the

clerical category continued to dominate the other classifications, ending with over $1.7 million out of a total payroll of approximately $2.1 million in that category. While the categories had changed on paper, Windy Labor had not actually shifted its operations from labor to clerical work. Duff had decided to keep the premiums down by making what would turn out to be massive and long-term misrepresentations.

To effectuate this scheme, Duff wove an intricate web of lies using employees and business associates. Duff met with auditors, giving fake figures regarding the business, and initiated his office manager in the ways of falsely representing the employees as clerical. Windy Labor provided client lists with false designation and engaged in delay and suppression of payroll records.

Red flags flew. Casualty obtained loss runs, which are summaries of the injury claims, and showed nearly all Windy Labor injuries coming from the warehousing class, even though clerical was dominant. Casualty also sent multiple notices of cancellation during the period of coverage because of Casualty's inability to complete audits. While the policy was never cancelled, Casualty transmitted these notices to Leahy & Associates. Casualty did not catch on to the fraud before it left the assigned risk pool in 1995.

When Casualty left the assigned risk pool in 1995, Windy Labor had to apply for a new assigned risk carrier. This became a familiar refrain, as Windy Labor was left

searching for carriers in 1998, 1999, and 2000.[1] The person at Leahy & Associates responsible for the account was Edward Wisniewski, who assumed this duty in 1989. Wisniewski's primary role was completing insurance applications and contracts, though he also interfaced between Windy Labor and the relevant insurer, passing along any concerns or questions from one to the other.

Despite the frequent turnover in insurance companies, the scheme continued. Duff remained resolute in his belief that the premiums were too high and continued to have his office employees overstate the clerical portion of the workforce. Complicating matters for Windy Labor, the insurance companies expected to conduct routine audits to verify the information on the policies. Rather than giving the information, which would reveal the plot, Windy Labor employees stonewalled auditors, submitted false worker information and client lists, and even forged a letter supposedly from an outside accountant that confirmed the lies.

Windy Labor's actions did not go completely unnoticed. Both USF&G and Kemper threatened to cancel

---

[1] For purposes of completeness, the relevant carriers were USF&G (1995-1998), Kemper (1998-1999), Amcorp (1999-2000), and Travelers (2000-present). We will discuss each as necessary to illuminate the fraud.

their policies for failure to submit to audits. Wisniewski was informed and often worked with Windy Labor employees to avert this possibility by revealing some information that would satisfy the insurer without endangering the scheme. This worked to some extent. For example, USF&G left the assigned risk pool in 1998 without ever completing its final audit. For its part, the Insurance Council tried to untangle the disconnect between the small number of warehouse workers and the huge number of claims emanating from this class. In response, Wisniewski and Windy Labor offered a compelling mix of rationalizations and false information, including doctored client lists, to defuse the inquiry.

Circumstances surrounding Kemper's response to its unsatisfying audit cast some additional light on the fraud. Receiving a cancellation notice in 1999, Duff instructed his office manager, Cathy Martinez, to call Leahy to sort out the problem. Martinez and another Windy Labor employee, Heather Placek, had a conference call with Leahy and Wisniewski shortly thereafter. Without going into the details of the situation, Martinez told Leahy that Duff asked her to talk to him. According to Martinez, Leahy's response was "you know, you got to do whatever you got to do to get this done or you're not going to have insurance." At this point, Placek, who had limited exposure to the insurance scheme, pointedly stated, "Has this occurred to anyone that this is insurance fraud?" According to Martinez, after a pause, Leahy again responded that Windy Labor had to do whatever it took

to get this done, or they would not have insurance. Eventually, the plotting was rendered irrelevant when Illinois would not let Kemper terminate the insurance contract for procedural reasons. Still, Windy Labor's actions had significant repercussions. As Kemper had not been able to complete its audit, Windy Labor was barred from placement in the assigned risk pool. Moreover, Kemper referred Windy Labor to the Insurance Council, alerting that organization to its belief that Windy Labor was engaging in premium misrepresentation.

The failure to complete audits, however, was not the only red flag. Windy Labor had an extremely high experience modifier during this time because of its rampant misclassification of its work force. At one point, the experience modifier reached 3.23, which meant that Windy Labor had more than three times as many accidents as the average employer in its category. As one USF&G employee testified at trial, "this mod actually is extremely high, considering that ... most of the employees were clerical ... [b]ecause clerical positions normally don't generate a high percentage of loss or injury on the job." Later, when Windy Labor was barred from the assigned risk pool in 1999, Leahy & Associates turned to another broker, Vincent Braband, to help with obtaining insurance in the voluntary market. While reviewing the file, Braband immediately noticed the extremely high experience modification factor (2.78), which was the highest he had seen and which he took as a signal of

misclassification. This notion was confirmed when he sent the numbers to Amcorp Insurance, whose agent also noted the modification factor and felt that it was a clear sign of misclassification.

Leahy & Associates, uniformly in the person of Wisniewski, repeatedly learned of these red flags. At one point, USF&G contacted a Windy Labor client who actually spoke candidly (and truthfully) about what Windy Labor workers did at his company. Upon learning of this conversation, Wisniewski responded that the information was wrong and relayed the issue to Duff, who pressured the client into retracting. A few years later when Braband was attempting to find a voluntary carrier for Windy Labor, he inspected the file and spotted the small labor classification with an extremely high number of manual accidents. Together with the experience modification issue, Braband felt the clerical was grossly overestimated and told Wisniewski as much, explaining that he needed correct classifications for any possibility of placement. Faced with these objections, Wisniewski immediately submitted new numbers to Braband, flipping the clerical payroll from $1.2 million to $600,000, the warehousing amounts from $75,000 to $1.2 million, and the janitorial amounts from $91,000 to $800,000. Eventually, Amcorp agreed to insure Windy Labor, but the premium was more than three times what Windy Labor had been paying.

In 2000, after Amcorp declined to renew Windy Labor's voluntary policy because of the high rate of claims,

Duff decided to combine Windy Labor with a different Duff company that had a good insurance track record, Remedial. Hoping to avoid revealing Windy Labor's experience modifier (and take advantage of Remedial's low modification factor), this transaction was styled as a purchase and not disclosed as required. Despite repeated requests by insurance providers for information about the combination, Wisniewski and Windy Labor /Remedial employees (including Stratton) stonewalled and responded that no such information was needed. On account of this tactic, Remedial had problems obtaining insurance for the Windy Labor portion of the business. Eventually, however, it contracted with Travelers, which forced Remedial/ Windy Labor to send, in 2001, a form acknowledging the merger after Travelers threatened cancellation of its policy. Travelers continues to provide workers compensation insurance to Remedial, though the Insurance Council adjusted the experience modifier based on the completed form.

Through this extensive scheme to hide the true nature of Windy Labor's business, the company paid approximately $1.09 million less in premiums than it should have.

C. Trial

In 2003, the federal government charged the major players in the Duff frauds in a thirty-three count indictment covering both schemes. Basically, the indictment charged the various defendants with violations of RICO, mail and wire

fraud statutes, money laundering, and tax offenses. Shortly before trial, Duff pleaded guilty to all counts. Dolan followed suit. Although Green Duff was indicted, prosecutors declined to try Green Duff because of a rapid decline in her mental health. Wisniewski, Leahy, Stratton, and a Remedial supervisor, Starling Alexander, went to trial. After a month-long trial, the jury returned guilty verdicts for all the defendants except for Alexander, who was only tangentially involved in the scheme.

The district court sentenced Duff to 118 months' imprisonment and ordered restitution in the amount of $12,026,582.02. The district court sentenced Stratton to seventy months' imprisonment and restitution in the amount of $7,370,739.00. The district court sentenced Dolan to twenty-one months' imprisonment. The district court sentenced Leahy to forty-six months' imprisonment and ordered restitution in the amount of $1,093,566.00. Wisniewski received a sentence of a year and a day and chose not to appeal.

II.

In this consolidated appeal, the defendants attack jury convictions, pleas, and sentences. For Duff, Dolan, and Stratton, the centerpiece of their appeals challenges the sufficiency of the indictment, alleging that the fraud on the city could not meet the requirements of mail or wire fraud. Building from this foundation, Stratton, joined by Duff,

argues that, if the mail and wire fraud counts do not constitute crimes, the money laundering charges, which rely on them, necessarily falter. Stratton also challenges the prejudicial spillover effect of this allegedly improper city scheme evidence, which he believes led to his conviction on the RICO conspiracy and the insurance fraud counts.

In addition to the major argument concerning the wire and mail fraud counts, Duff raises a number of challenges to his sentence. He first contends that the district court should not have calculated his guidelines offense level using a $10 million loss to the city since, he claims, the city actually lost nothing on the contracts. Duff also asserts that the district court erred by not awarding him a full three-point reduction for acceptance of responsibility and by applying several improper enhancements. Finally, Duff argues that restitution to Chicago was improper, returning to his theme that the city suffered no loss.

Leahy, for his part, begins with a sufficiency of the evidence challenge and also contends that the district court erred by delivering an "ostrich" jury instruction. Leahy also faults the district court for a range of evidentiary decisions. He proceeds to argue that the district court erred by not severing the trial of the insurance fraud counts from the trial of those counts involving the city scheme. Leahy concludes his challenges by asserting that the district court improperly calculated the period of his involvement in the conspiracy, which redounded to his detriment at sentencing.

STRATTON, DUFF, AND DOLAN'S TRIAL, PLEA, AND SENTENCING ISSUES

A.

We first consider Duff, Dolan, and Stratton's argument that the city scheme referenced in the indictment cannot support a conviction under the applicable mail and wire fraud statutes. Specifically, they contend that the only loss Chicago suffered was to its regulatory interests–an intangible right unprotected by these statutes. We review a challenge to the sufficiency of an indictment de novo. *See United States v. Gee*, 226 F.3d 885, 891 (7th Cir. 2000); *United States v. Briscoe*, 65 F.3d 576, 582 (7th Cir. 1995).

We begin our evaluation of the indictment's validity by examining the words of the relevant statutes, the first being mail fraud.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341.

"The elements of wire fraud under 18 USc. § 1343 directly parallel those of the mail fraud statute, but require the use of an interstate telephone call or electronic communication made in furtherance of the scheme." *Briscoe*, 65 F.3d at 583. The requisite elements of these offenses, therefore, are three: (1) a scheme to defraud; (2) an intent to defraud; and (3) use of the mails or wires in furtherance of the scheme. *See United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004); *United States v. Britton*, 289 F.3d 976, 981 (7th Cir. 2002). Cases construing one are equally applicable to the other. *See United States v. Stephens*, 421 F.3d 503,507 (7th Cir. 2005). To show the intent to defraud, we have consistently required a "wilful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *Britton*, 289 F.3d at 981. *See also United States v. Davuluri*, 239 F.3d 902, 906 (7th Cir. 2001); *United States v. Hickok*, 77 F.3d 992, 1003 (7th Cir. 1996) (stating that mail and wire fraud are specific intent crimes). These statutes do not require the government to prove either contemplated harm to the victim or any loss. *See United States v. Vincent*, 416 F.3d 593,600-01 (7th Cir. 2005) (addressing loss); *United States v. Fernandez*, 282 F.3d 500,507 (7th Cir. 2002) (discussing contemplated harm). Moreover, a defendant's honest belief that his actions will ultimately result in a profit and not a loss is irrelevant for determining whether a violation

has occurred. *See Davuluri*, 239 F.3d at 906; *United States v. Masquelier*, 210 F.3d 756, 759 (7th Cir. 2000).

The mail and wire fraud counts of the indictment dedicated to the city scheme (Counts 2-15) charged that Duff, Stratton, Dolan, and others hatched and executed a plan to obtain fraudulently over $100 million in contracts and subcontracts from the city of Chicago by lying about the Windy Maintenance and Remedial ownership structure. The indictment goes on to detail precisely how Duff and the others used or caused to be used the mails and wires in furtherance of this scheme.

The defendants, however, believe that, despite its express references to the money they obtained, the indictment did not allege a deprivation of money or property. They arrive at this interesting conclusion by positing that Windy Maintenance and Remedial fulfilled their obligations under the relevant contracts or subcontracts. The argument continues that because the city would ostensibly have paid the same for the provided services regardless, Chicago lost no money. According to the defendants, Chicago only lost a regulatory interest in controlling exactly where its money went. They conclude, therefore, that the mail and wire fraud counts of the indictment charged an intangible rights scheme, which cannot survive under Supreme Court precedent like *McNally v. United States*, 483 US 350 (1987) and, more recently, *Cleveland v. United States*, 531 U.S. 12 (2000).

Despite the defendants' contortions to squeeze this case into the intangible rights category, we cannot agree that it is such a case. The mail and wire fraud statutes require that the object of the fraud is money or property, rather than an intangible right.[2] *See Cleveland,* 531 U.S. at 15 (stating that "for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim"); *McNally*, 483 U.S. at 360. In *Cleveland*, the scheme turned on defrauding the government out of a video poker license by making false statements on the licensing application. *Id.* at 15-17. The Supreme Court indicated that a violation of § 1341 or § 1343 must implicate a government's role as a property holder, not just its role as sovereign. *Id.* at 23-24. In *Cleveland*, the Court found that falsely obtaining a license did not. *Id.* at 21-23. The Court noted that the licenses sought "do not generate an ongoing stream of revenue" and, importantly for the present case, "the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law." *Id.* at 22. Turning its attention to the government's argument that the state had a right to choose to whom it would award a license, the Court responded that this

---

[2]We, of course, acknowledge a limited exception to this rule for the deprivation of the "intangible right of honest services." 18 U.S.c. § 1346. Congress grafted this additional ground for mail and wire fraud on to the money and property requirement in response to McNally. See Cleveland, 531 U.S. at 19-20.

was not a property right, but an intangible right–the power to regulate. *Id.* at 23.

In our case, however, the scheme precisely and directly targeted Chicago's coffers and its position as a contracting party. As opposed to the situation in *Cleveland*, the indictment here alleges a plot with an aim different from obtaining licenses or certifications. *Cleveland* addresses a situation in which a defendant commits fraud against a governmental body only acting as regulator; here the fraud was committed both against Chicago as regulator and also against the city as property holder. The certifications were necessary steps, but they were not the object of the long-ranging fraud. That object was money, plain and simple, taken under false pretenses from the city in its role as a purchaser of services.

We cannot agree with the defendants that previous cases from our court aid their quest to remove the present fraud from the reach of the federal mail and wire fraud statutes. In *United States v. Ashman*, 979 F.2d 469, 479 (7th Cir. 1992), we found that one aspect of a fraudulent trading scheme did not qualify as mail or wire fraud under the federal statutes because there was no possibility of a loss given the structure of the daily trading rules. Put another way, while fraud occurred, no money or property was possibly at issue, so these limited segments of Ashman's overarching fraud could not be punished under § 1341 or § 1343. *See id.* The defendants try to fit the present case under *Ashman* by arguing

that Waste Management and other such general contractors had agreed with Chicago for a price for labor or janitorial services, and the price was inflexible, regardless of the fraud. This is a much different case from *Ashman*, which involved a complete physical impossibility of loss due to the way that the trading market was set up. In this case, Chicago simply received one type of services it contracted for through these subcontracts-cleaning and janitorial services. Chicago completely lost the other type of services for which it was paying the contractors and the Duff companies-services performed by an MBE or an WBE precisely because the company is a qualified MBE or WBE. Windy Maintenance and Remedial would not have received the subcontracts, and the general contractors ostensibly would not have won the bids, without the fraudulently gained certifications. Chicago suffered a loss of money in that it paid for a service provided by an MBE or WBE that it did not receive, and *Ashman* does not compel us to conclude otherwise.

Nor do we believe this case similar to *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). In that case, a sports agent signed secret contracts to become the agent for a variety of athletes while they were still in college and receiving scholarship money. *See id.* at 1221. The government's theory was that Walters committed fraud by causing the universities to pay scholarship money to students who were ineligible, thus resulting in a loss of money to the universities. *See id.* We found the prosecution defective because the universities

"were not out of pocket to *Walters*." *Id.* at 1224 (emphasis in original). Walters did not obtain any money from the universities as part of his scheme to defraud. In this case, Duff and his cronies engaged in a fraud directly targeting the city and, unlike Walters, obtaining money from Chicago through the fraudulent scheme.

Looking at the requirements for mail and wire fraud, the indictment establishes each element. First, it alleges a scheme to defraud the city of money by obtaining contracts through false pretenses. Both the direct contracts with Chicago and the various subcontracts would not have been awarded in the absence of the MBE/WBE certifications obtained through fraud. Second, the indictment shows an intent to defraud Chicago out of its money by engaging in this practice. As stated above, it does not matter that Duff and his cronies thought that Chicago was getting a service worth every dime in the contracts.[3] All that is required is a wilful act

---

[3] As the government clearly stated at oral argument, Chicago was aware that the services rendered by the MBEs or WBEs would not be the most efficient or the lowest-priced possible. Nonetheless, the "city was willing to pay these premiums [ ] to these MBE/WBE contractors in order to foster their growth and to permit them to earn a profit that they would otherwise not have access to on a purely open bidding system." A corollary of this proposition is that an efficient, established business, given the advantage of MBE/WBE status, would earn more than it would normally receive under a truly open bidding system, in which it would compete against similarly

with the intent to deceive or cheat by each of the defendants, which the indictment demonstrates. Specifically, Duff deceived Chicago regarding the true status of his companies. Finally, the mails and wires were used in furtherance of the scheme. Therefore, we conclude that the district court correctly rejected the defendants' argument challenging the sufficiency of the indictment. [4]

---

established companies with the same experience and efficiencies of scale. Duff was a highly experienced businessman who easily made substantial profits off the MBE /WBE contracts and paid the surplus to family members and associates who performed little or no work for the various entities under contract. At sentencing, the district court emphasized that the goal of Chicago's program was fundamentally frustrated, remarking "it's a double loss, the loss that we computed and the real loss to all the people that didn't get this business, that didn't get a chance to build their businesses, ... that didn't get a chance to become successful minority and women-owned businesses, because this huge amount was diverted."

[4] Given our decision that the indictment properly alleged offenses under § 1341 and § 1343, Duff and Stratton's challenge to the money laundering convictions also must fail as it is based solely on the alleged impropriety of the mail and wire fraud charges. Stratton further claims that evidence of the city scheme had an improper prejudicial spillover effect that led to his conviction on both the RICO count (Count 1) and a count of mail fraud relating to his limited participation

B.

We proceed to Duff's contention that the district court improperly calculated his offense level on the fraud convictions because Chicago suffered no loss. Both parties agree that Guideline § 2F1.1 applies to this case. This guideline provides a base offense level for crimes involving fraud and deceit, then increases the offense level depending on the amount of money at issue. U.S.S.G. §2F1.1(1998). We review the definition of loss de novo, and the district court's calculation of the amount of loss for clear error. *See United States v. Vivit*, 214 F.3d 908, 914 (7th Cir. 2000). Here, the district court determined that the amount of loss was the amount of profits that Duff gained from the city scheme.

We agree with Duff that the district court incorrectly calculated the amount of loss, but this result will likely not mollify him because we further believe that the district court's figure was too low, not too high. Generally, loss under § 2F1.1 "is the value of the money, property, or services unlawfully taken." U.S.S.G. §2F1.1 application note 8. As the district court concluded, however, a different, more specific, application note applies in this situation. Application note

---

in the insurance scheme (Count 22). This argument hinges on the contention that the mail and wire fraud charges should have been dismissed and the evidence should not have been presented. As we have ruled that Chicago's scheme charges were proper, this argument likewise must fail.

8(d) provides: "In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses." Duff argues that this is not a case of "government program benefits" and that the application note governing contract procurement should apply. Duff is wrong. As the ordinance itself states, "[a]n effort to direct contracts to minority- and women-owned businesses is required to eradicate the effects of discrimination." This was an affirmative action program aimed at giving exclusive opportunities to certain women and minority businesses. The contracts which these businesses received pursuant to this type of program constitute government benefits. We are not alone in this conclusion. *See United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-18 (4th Cir. 2000). Application note 8(d), therefore, applies.

The district court, however, erred when it did not calculate the loss under application note 8(d). Instead of computing the total "value of the benefits diverted from intended recipients or uses" in its analysis, it used the contract loss formula of "contract price minus the benefit provided." Once the district court determined that this was a case involving diversion of government benefits, however, it was bound to follow the application note that governed this situation. *See United States v. Sorensen*, 58 F.3d 1154, 1158-59 (7th Cir. 1995). The correct amount under application

note 8(d) is the value of the benefits diverted, which was over $100 million.[5]

Nonetheless, a remand is unwarranted because the government did not cross-appeal on this issue. Moreover, the fraud counts were grouped with the money laundering counts pursuant to Guideline § 3D1.2(d), and Duff was sentenced based on the money laundering convictions, as they carried the highest offense level. U.S.S.G. § 3D1.3. Even including the proper amount of the loss attributable to the wire and mail fraud, it appears that the money laundering offense level would still be higher, so a remand would change nothing.

C.

Turning to Duff's next challenge, he believes that he was entitled to a three-point reduction in his offense level because of his acceptance of responsibility. As this is a factual finding, we review the district court's decision not to award any points for clear error. *See United States v. Gilbertson*, 435 F.3d 790, 798 (7th Cir. 2006); *United States v. McIntosh*, 198 F.3d 995, 999 (7th Cir. 2000). The defendant bears the burden of proving that he deserves such a reward. *See McIntosh*, 198

---

[5] To its credit, the district court itself expressed reservations about using the contract method of evaluating loss, stating "[i]n writing this opinion, I am less convinced that I was correct in determining 'loss' not to be the entire amount of the contract."

F.3d at 999. We afford the district court large discretion in making this determination because the sentencing "judge is in a 'unique position to evaluate a defendant's acceptance of responsibility.'" *Gilbertson*, 435 F.3d at 799 (quoting U.S.S.G. § 3E1.1, cmt. 5). We allow district courts to exercise common sense when evaluating the testimony and the defendants. *See McIntosh*, 198 F.3d at 999. An appellate court is inherently ill-equipped to make this determination by the very nature of our review, as we face a cold record, while the district court actually heard the tenor of the defendant's words and studied his attitude. *See Gilbertson*, 435 F.3d at 799.

Guideline § 3E1.1 provides that a court is to give a twopoint reduction if the defendant "clearly demonstrates acceptance of responsibility for his offense," and that a court may give an additional point if the acceptance is timely. The application notes to this guideline lay out a variety of factors that a court should consider when making this determination. Among these factors are whether the defendant truthfully admitted the conduct, whether the defendant voluntarily made restitution prior to adjudication of guilt, whether the defendant gave voluntary assistance in the recovery of the fruits of his offenses, whether the defendant underwent post-offense rehabilitative efforts, and the timeliness of the defendant's acceptance of responsibility. U.S.S.G. § 3E1.1 application note 1.

The district court did not clearly err when it refused to decrease Duff's offense level. Duff suggests that the district

court did not attach enough weight to his factual basis, plea of guilty, and expressions of remorse, while emphasizing too greatly his less-than-forthcoming attitude at the plea hearing. Given the amount of latitude we afford to the district courts in this arena, we disagree.

First, the district court judged that Duff's plea did not reflect a true belief that he was culpable, but a calculated decision to gain the advantage of the reduction. Acceptance of responsibility usually will be awarded after a guilty plea, but such a plea does not transform this reduction into a matter of right. *See United States v. Willis*, 300 F.3d 803, 807 (7th Cir. 2002); *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2005). Looking at the factual basis and plea hearing, Duff made halting admissions, even to simple questions, and refused to go beyond the bare bones of the indictment, making the government and the district court struggle to obtain many crucial answers about the city scheme. Duff did accept and admit many of the non-critical portions of the indictment, but consistently fought to reframe the city scheme in his own best interests. While a " 'defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction,'" *United States v. Carroll*, 346 F.3d 744, 750 (7th Cir. 2003) (quoting U.S.S.G. § 3E1.1 application note l(a)), this does not mean that the district court must blind itself to a defendant's conduct and attitude when pleading guilty, especially as here when the defendant seems to be using the plea hearing to

minimize his activity to evade future scrutiny. If the defendant takes an overly aggressive posture, this could mean that he does not actually accept his fault. We cannot categorically say that a district court must ignore such indications simply because a guilty plea is involved.

Still, if Duff's conduct at the plea hearing constituted the district court's only justification for denying this reduction, we would be faced with a very close case. But here, the district court went further both at the sentencing hearing and in its sentencing memorandum and catalogued additional support for its conclusion that Duff did not really think he was not to blame, no matter his mouthed words of remorse. Specifically, the district court mentioned that Duff's contention that "no one else could have done the contracts" showed no appreciation for the harm he caused. The district court was also disturbed by Duff's failure to acknowledge a fact conclusively demonstrated at trial-that Duff used his companies to pay Stratton and family members even though they did no work. As application note 1(a) states, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines true has acted in a manner inconsistent with acceptance of responsibility." U.S.S.C. § 3E1.1 application note 1(a). The district court had extensive opportunities to observe and listen to Duff and determine whether he was sincerely contrite or engaged in spin. Based on our searching review of the plea hearing, the sentencing hearing, and the sentencing memorandum, we cannot say that

the district court abused its discretion in concluding that Duff had failed to accept "moral responsibility" for his crimes.

Ultimately, however, even if we believed that the district court committed some error regarding acceptance of responsibility, it was harmless. In its sentencing memorandum, the district court stated "[s]ince this sentence, under *Booker*, is not limited to consideration of a narrow range following a strict determination of points under a particular Guidelines Manual, however, I considered the sentencing range that would be applicable with or without acceptance of responsibility." The transcript from the sentencing hearing also shows the district court properly calculated guideline ranges both with and without the acceptance of responsibility points. The court then decided upon a sentence of 118 months and gave a lengthy explanation both at the hearing and in the memorandum regarding its decision. As the sentence would have been imposed no matter the ruling on acceptance of responsibility, Duff suffered no harm.[6]

---

[6] In the event that we had ruled in his favor on the fraud and money laundering counts, Duff presented several additional arguments regarding enhancements. As we did not agree with his various positions, these arguments are moot.

D.

Moving to his actual sentence, Duff mounts a reasonableness challenge. After *Booker*, a district court must "first consult a properly calculated advisory Guidelines range and then, by reference to the factors specified in § 3553(a), select a sentence either inside or outside the advisory range." *See United States v. Walker*, 447 F.3d 999, 1007 (7th Cir. 2006). This is a distinction with a difference in our post-*Booker* world, since a sentence within the guideline range is presumptively reasonable, *see United States v. Owens*, 441 F.3d 486, 490 (7th Cir. 2006), while a sentence outside the guideline range requires more explanation based on the § 3553(a) factors, *see Walker*, 447 F.3d at 1007. The parties agreed at the sentencing hearing that without the acceptance of responsibility reduction the guidelines range would be 108-135 months and if acceptance of responsibility was counted, the range would drop to 78-97 months. Taking the district court at its word that the 118-month sentence applied with or without the acceptance of responsibility points, this sentence could be deemed either outside the guideline range or within. We will only examine the sentence as one outside the range since if the sentence survives this more searching review, it would obviously suffice if within the range (and presumptively reasonable).

The district court adequately explained the reasons for its sentence, examining the various § 3553(a) factors in detail. In particular, the district court mentioned the severity of the

offenses, which defrauded victims of over one hundred million dollars. The offenses were not one-time affairs, but the long-term duping of the victims by flooding them with a coordinated attack of falsehoods. Even more troubling, Duff used and corrupted his employees and his own family, particularly his mother and wife, to satisfy his greed. Moreover, the district court also laid emphasis on Duff's ready willingness to flout laws to gain his criminal objectives and the apparent difficulty in deterring a man who would engage in these types of dealings for over a decade. The district court then assessed the nature and circumstances of Duff's character, which further condemned him. He acted out of avarice, not necessity, and, as became clear at trial, threatened and bullied others to get his way.[7] In short, the district court had a thoughtful and meaningful analysis regarding why Duff's crimes merited 118 months of imprisonment. Our review is deferential, as the district court was in the best position to judge. *See Walker*, 447 F.3d at 1008. The district court's evaluation gave a mountain of reasons for a sentence outside the guidelines range, and we find the sentence reasonable.

---

[7] The trial provided a particularly insightful glance into Duff's personality through the testimony of his own employees, auditors, and clients, which demonstrated his willingness to scream, bully, and threaten (including threats of harm against another's family) to get his way.

E.

Duff finally argues that the district court's restitution order in the amount of $10,933,016.02 for Chicago was improper as Chicago did not lose any money under the contracts. Again, we reject Duff's contention. We review the amount of restitution for abuse of discretion. *See United States v. Brierton*, 165 F.3d 1133, 1139 (7th Cir. 1999). The Mandatory Victims Restitution Act ("MVRA") provides that restitution will be ordered to any victim for "an offense against property under this title, including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii). The MVRA defines a victim as any person directly harmed by a defendant's criminal conduct in the course of a scheme, *see United States v. Belk*, 435 F.3d 817, 820 (7th Cir. 2006); 18 U.S.C. § 3663A(a)(2), and a government agency can be a victim for these purposes, *see United States v. Sapoznik* 161 F.3d 1117, 1121 (7th Cir. 1998). To calculate the restitution amount, the district court must determine the loss caused by the crime, which is the greater of (1) the value of the property on the date of the damage, loss, or destruction, or (2) the value of the property on the date of sentencing. *Belk*, 435 F.3d at 819; 18 U.S.C. § 3663A(b)(1)(B). The court then subtracts from that amount the value of any returned property. *Id.* Duff contends that since his companies performed the contracts, and performed

them well, the companies returned full value to Chicago for its money and that restitution should not be required.[8]

Again, Duff misses the point. The contracts were not simply for cleaning and labor services but for rendering services by legitimate MBE /WBEs. While Duff's companies provided valuable cleaning services, they could not possibly return Chicago's property because they could not achieve Chicago's desired goal of developing and sustaining an emerging minority business. As the government mentioned at oral argument, Chicago was not looking for the best deal possible on these contracts precisely because it wanted to give the money to nurture particular recipients-MBEs and WBEs. Therefore, performing the contract adequately did not provide the consideration for which Chicago bargained: it did not support the proper minority or women businesses.

The question then becomes whether the district court's restitution amount was a correct approximation of the difference between the services rendered and what the city anticipated from a contract with a proper MBE or WBE. We

---

[8] Duff also suggests, without developing the argument, that it is in some way inequitable for a district court to order restitution and forfeiture in the same amount. While we recognize to the untrained eye, this might appear to be a "double dip," restitution and forfeiture serve different goals, and we have approved of this practice in the past. *See United States v. Emerson*, 128 F.3d 557,56667 (7th Cir. 1997).

find some guidance from the *Sapoznik* case cited previously. Sapoznik was a suburban police chief who received $500 per month for four years from the Mafia to shield its gambling interest in his town. *See Sapoznik*, 161 F.3d at 1118. The district court ordered restitution to the town in the amount of one year's salary as police chief. *See id.* at 1121. We recognized that the town likely would have never hired Sapoznik had it known of his easy virtue, which would mean that it would not have paid him salary for any of his four years as chief. *Id.* However, we also understood that the town would not have saved the entire amount of his salary, as the government suggested, because "it would have hired an honest police chief and paid him the same." *Id.* After noting that most of his work was exemplary, we found that the restitution order, which generously credited Sapoznik for providing value to his employer for three-quarters of his salary despite his infidelity was proper. *Id.* at 1122. "Given the difficulty of estimating the loss that he actually imposed on the city (as opposed to the gain that he conferred on the gambling dens and the Mafia), we think the district judge acted within the limits of her discretion." *Id.*

In the present case, we confront a similar situation in which the actual loss to Chicago from not enlisting a true MBE or WBE for these contracts is inherently difficult to quantify. Faced with this situation, we determine that the loss amount calculated by the district court, which effectively credits the Duff companies as being worth to Chicago

approximately 90% of a proper MBE/WBE, is a generous credit in favor of Duff. Given the wide latitude we afford a district court in this situation, we conclude that the district court did not abuse its discretion when calculating the restitution amount.

LEAHY'S TRIAL AND SENTENCING ISSUES

F.

We now address the issues arising from Leahy's trial and sentencing. First among these is his belief that the government did not produce sufficient evidence to convict him of mail and wire fraud in connection with the insurance scheme. Closely tied to this assertion is Leahy's theory that, given the paucity of the evidence against him, the district court should not have given an ostrich instruction, which allowed the jury to convict him despite the insufficient evidence.

Turning first to the sufficiency of the evidence, Leahy, like all such challengers, carries a heavy burden. We view the evidence in the light most favorable to the prosecution. *See United States v. Tadros*, 310 F.3d 999, 1005-06 (7th Cir. 2002). We find the evidence insufficient only if no rational trier of fact could have found guilt beyond a reasonable doubt. *See id.* at 1006. As Leahy was convicted of multiple counts of mail and wire fraud arising out of the insurance scheme, we examine any evidence of a scheme to defraud, an intent to

defraud, and use of mails and wire to further it. *See United States v. Seward*, 272 F.3d 831, 835 (7th Cir. 2001).

Even looking at the evidence in the light most favorable to the government, this is a relatively close case. The 1999 telephone call about the Kemper notice of cancellation, together with the circumstances surrounding this call, were the strongest pieces of evidence tying Leahy to the scheme. As discussed previously, Windy Labor received a notice of cancellation from Kemper, its insurer, for failure to complete an audit. Martinez, the Windy Labor employee who worked most closely on the insurance fraud, turned to Duff. For his part, Duff commanded Martinez to call Leahy. During the conference call, Leahy exhibited knowledge that Kemper wanted to cancel the policy based on an inability to complete its audit. He did not react with surprise. Rather, he suggested that Windy Labor had to do whatever necessary to obtain insurance. When Placek expressed her feeling that they were perpetrating insurance fraud, Leahy did not disagree. There was simply silence, eventually broken by Leahy, who reiterated his feeling that the options were either do whatever needed to be done or have no insurance. Taking the evidence in the light most favorable to the government, it seems unlikely that Duff would involve Leahy in such a sensitive matter unless Leahy knew about the scheme. Moreover, the testimony about this phone call shows Leahy was aware of the problems with the audit and felt that anything, including

insurance fraud, was authorized to defuse the potential bomb. This is strong evidence of Leahy's involvement.

However, this was not the only evidence suggesting Leahy's role in the insurance scheme. The Windy Labor account was a haven of red flags that would be obvious to anyone familiar with workers compensation insurance. At trial, multiple insurance witnesses testified that the experience modifier for Windy Labor in the 1990s was extremely high, which was a clear tip-off that there might be serious job misclassification. In fact, several of the witnesses, including a Kemper auditor with over twenty years of experience and Braband, the experienced insurance broker, stated that they had never come across a modifier that high. Besides the high experience modifiers, the loss-run information constituted another red flag. As explained previously, the loss runs showed the type of claims filed and the classification of the employees who filed them. The loss runs compiled for Windy Labor indicated that the injuries were occurring almost entirely in the labor categories and involved more employees than were actually in that category. This takes on particular significance considering that applications and policies sent to Leahy & Associates, and sometimes generated by Leahy & Associates, showed that the workforce was almost entirely clerical. Finally, insurance companies repeatedly issued notices of cancellation to Windy Labor, with copies to Leahy & Associates, for failure to properly complete the audits.

Taking the evidence in the light most favorable to the prosecution, these red flags are strong circumstantial evidence. While there is no direct evidence that Leahy looked at any of this information, he would have had to completely ignore this part of his business for the better part of a decade in order to miss it. Contradicting this possibility, Maribel Gomez, one of his emp loyees, described Leahy at trial as hands-on boss who was aware of the happenings on the policies. The chance that he simply was not aware of the doings at his own company seems even more unlikely when one considers that it was Leahy, not Wisniewski, who was Duff's connection at Leahy & Associates. Moreover, it seems most improbable that Wisniewski would cooperate in massive fraud for one of Leahy's family friends without Leahy having something to do with it. Bolstering this point was Leahy's willingness to protect Duff's fraud against Chicago by misleading the investigators regarding the true structure of Windy Maintenance. The evidence of the 1999 telephone conference, combined with numerous, significant red flags on the account and the circumstances suggesting his involvement, provide sufficient evidence to support the jury verdict.

This brings us to the propriety of the ostrich instruction, which assumes additional significance given the relatively thin evidence here. The ostrich-or deliberate avoidance-instruction is used to inform the jury that the legal definition of knowledge includes deliberate avoidance of

knowledge. *United States v. Fallon*, 348 F.3d 248, 253 (7th Cir. 2003). The district court instructed the jury:

> Knowledge may be proved by the defendants' conduct and by all the facts and circumstances surrounding the case. You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly as I have used that word. You many not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth.

This instruction was nearly identical to the pattern Seventh Circuit jury instruction on this subject, *see United States v. Carrillo*, 435 F.3d 767, 779 (7th Cir. 2006), and Leahy does not argue that the formulation of the instruction was error. Rather, Leahy argues that evidence is insufficient to support the ostrich instruction. We review the district court's decision to give this instruction for an abuse of discretion, viewing the evidence in the light most favorable to the government. *See United States v. Craig*, 178 F.3d 891, 896 (7th Cir. 1999); *United States v. Trigg*, 119 F.3d 493, 504 (7th Cir. 1997).

The ostrich instruction is appropriate if a defendant claims a lack of guilty knowledge and the evidence supports an inference of deliberate avoidance. *See, e.g., Fallon*, 348

F.3d at 253. This second prong means that a defendant deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will. *Id.* Inherent in this instruction is the difficulty in distinguishing between the cutting off of one's curiosity and a simple lack of effort. *See Carrillo*, 435 F.3d at 780. The latter cannot be punished.

Leahy only attacks the second prong of the ostrich instruction requirements, contending that the evidence did not support an inference of deliberate avoidance but only showed a simple lack of effort. Taking the evidence in the light most favorable to the government, we cannot agree and do not believe that the district court abused its discretion when it gave this instruction. The evidence, while not overwhelming, offers several indications that Leahy hid his head in the sand regarding the insurance fraud. We briefly return to ground already ploughed in our sufficiency of the evidence discussion. During the Kemper cancellation discussion, Leahy asked no questions about the audit problems and did not even question the allegation that fraud might be involved. "[F]ailure to ask questions that would certainly arise from the circumstances ... is evidence that could lead a jury to determine [the defendant] deliberately avoided learning about the [ ] scam." *Craig*, 178 F.3d 897-98. As demonstrated above, Leahy would have been exposed to numerous red flags, obvious to someone with his training and experience, over the duration of his business relationship with Windy

Labor. Contrast his claimed ignorance despite years of involvement with these accounts with the reaction of Braband, who immediately realized that the Windy Labor numbers were misclassified after a short review of the file. Taking the evidence in the light most favorable to the government, we cannot say that the evidence only shows a case of negligence. Rather, it shows repeated indications of deliberate avoidance by Leahy, and, given this conclusion, the inclusion of the ostrich instruction was appropriate.

G.

We next turn our attention to Leahy's various evidentiary challenges. We review such claims for abuse of discretion. *See United States v. McGee*, 408 F.3d 966, 981 (7th Cir. 2005); *United States v. Anifowoshe*, 307 F.3d 643, 646 (7th Cir. 2002).

Leahy first contends that the testimony of Hiegel (the assistant state's attorney who investigated the city scheme) constituted prohibited propensity evidence. Federal Rule of Evidence 404(b) generally excludes the introduction of bad acts" to show that a defendant has a propensity to commit a crime and that he acted in accordance with that propensity on the occasion in question." *United States v. Chavis*, 429 F.3d 662, 667 (7th Cir. 2005). Bad acts evidence may be admitted, however, for other purposes, such as to show intent, knowledge, lack of mistake, motive, or opportunity. See id.

We utilize a four-part standard to assess the admissibility of evidence under Rule 404(b):

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice.

Anifowoshe, 307 F.3d at 646.

Here, the district court properly admitted the evidence. Hiegel was investigating Windy Maintenance for fraud on the city relating to the WBE program when she discussed Green Duff's role with Leahy. Leahy falsely informed her that he exclusively met with Green Duff on insurance matters related to Windy Maintenance and he had nothing to do with Duff himself regarding Windy Maintenance. Leahy's description of the supposed structure of Windy Maintenance helped derail this investigation. Each of the Rule 404(b) requirements were met. This testimony demonstrated Leahy's intent to protect Duff and his fraudulent schemes, by showing his willingness to lie to investigators on Duff's behalf. Leahy's actions took

place at the same time that the insurance fraud occurred and involved lies and subterfuge to throw off investigators, just as in the insurance fraud scheme. Moreover, the jury easily could have concluded that Leahy lied to Hiegel, and this was not such inflammatory evidence that the probative value was outweighed by its small prejudicial effect. The district court, therefore, did not abuse its discretion when it admitted this evidence.

Leahy also second-guesses the district court's refusal to admit certain pieces of evidence. Leahy wanted the district court to admit a letter from a USF&G investigator to an FBI agent in which the investigator stated that she found no premium fraud by Windy Labor. The district court excluded the USF&G letter on hearsay grounds. The letter constitutes hearsay, but Leahy argues that it qualifies for a hearsay exception under Federal Rule of Evidence 804(b)(3). Under Rule 804(b)(3), the letter may be admissible if: (1) the declarant is unavailable; (2) the statement is against the declarant's penal interest; and (3) corroborating circumstances exist that bolster the statement's trustworthiness. Fed. R. Evid. 804(b)(3). Even assuming that the USF&G investigator was unavailable, Leahy cannot satisfy the second prong of this test. "A statement is against penal interest if it subjects the declarant to criminal liability." *United States v. Bonty*, 383 F.3d 575, 579 (7th Cir. 2004). The penal interest exception does not include statements that could possibly subject the declarant to prosecution. *See United States v. Butler*, 71 F.3d

243, 253 (7th Cir. 1995) ("The hearsay exception does not provide that any statement which 'possibly could' or 'maybe might' lead to criminal liability is admissible"); *see also Bonty*, 383 F.3d at 579 ("It is simply not enough that during the interview Bonty admitted to some facts ... that 'possibly could' lead to criminal liability; to be inculpatory he must admit to criminal behavior."). Rather, the statement itself, taken as is, must basically admit to criminal behavior. *See Butler*, 71 F.3d at 253. In this case, the USF&G letter does not inculpate the author in any crime or subject her to liability, so the district court properly deemed it hearsay.

Moreover, Leahy believes the court abused its discretion by excluding certain audits from evidence. These audits were conducted by Travelers from 2001-2003, after the discovery of the insurance fraud scheme. Leahy thinks that they exculpate him because they show that Windy Labor and Leahy & Associates were not responsible for any misclassification or insurance fraud once the Windy Labor schemers were removed. To be admissible, however, these documents must be relevant. Fed. R. Evid. 401 (relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") Just because Leahy did not continue with the fraud after the scheme had been discovered has no bearing on whether he participated before

the fraud was out in the open. As such, the audits were properly excluded on relevancy grounds.

Leahy finally contends that he was denied his Sixth Amendment right of cross-examination because the district court would not allow him to use the USF&G letter when questioning the government's insurance experts. While the Sixth Amendment guarantees the right to confront witnesses, trial judges have broad discretion to impose reasonable limitations. *See United States v. McLee*, 436 F.3d 751, 761 (7th Cir. 2006). In this instance, the district court used its power to limit a portion of an examination that would rely on hearsay material of marginal relevance. Again, we find no abuse of discretion.

H.

Having dealt with Leahy's complaints about the trial,[9] we move to his sentencing and restitution objections. First, Leahy argues that the district court should not have applied U.S.S.G. § 3B1.1, an enhancement for being an organizer or leader in the insurance fraud. This is a factual determination and, as such, we review for clear error. *See United States v.*

---

[9] Leahy made one additional trial complaint, that the district court erred when it denied his motion for severance. As he did not renew this motion at the close of the evidence, however, it was waived. *See United States v. Rollins*, 301 F.3d 511,518 (7th Cir. 2002).

Wasz, 450 F.3d 720, 730 (7th Cir. 2006). Leahy specifically asserts that he did not control Wisniewski or give orders to anyone to further the fraud. This, however, was not required. "Organizers 'do not necessarily control anyone but nonetheless influence the criminal activity by coordinating its members.'" *United States v. Skoczen*, 405 F.3d 537, 550 (7th Cir. 2005) (quoting *United States v. Reneslacis*, 349 F.3d 412, 417 (7th Cir. 2003)). When the insurance scheme was faltering, Duff sent his underlings to Leahy, not Wisniewski, for the solution. Moreover, Leahy provided cover for the insurance fraud through his brokerage firm and employees. Leahy, therefore, marshaled the people and instruments for this offense, which is sufficient. *See id.* While there is not an abundance of information supporting this finding, we do not believe that the district court clearly erred in adding this upward enhancement.

Leahy's next challenge is to the district court's calculation of the offense level, which hinged on the district court's loss determination. Leahy contends that the district court should not have computed the amount of loss for the entire period from 1989 through the ending of the scheme. The definition of loss is a question of law subject to de novo review, while the amount of loss is a finding of fact reviewed for clear error. *See Vivit*, 214 F.3d at 914. According to U.S.S.G. § 1B1.3,applicationnote 2, a defendant cannot be held accountable for acts that occur before he engaged in

criminal conduct. *See Nichols v. United States*, 75 F.3d 1137, 1143-44 (7th Cir. 1996).

The district court erred in calculating loss based on the entirety of the scheme. While Leahy was the insurance broker at the very start of Windy Labor, no evidence indicated that either Leahy or Leahy & Associates became involved with the insurance scheme until 1995. Apparently acting alone, Windy Labor changed the classifications, thus reducing premiums. The government and district court assumed that Leahy would have known about the fraud because of the changes in the payroll classifications in the policies and his business and social interactions with Duff and his family. Before 1995, however, the policy was essentially self-renewing with no input from Leahy and his company. Moreover, by the time that the fraud would have been most obvious with high modifiers and drastically different payroll, the file had been transferred to Wisniewski, whom the district court found was not responsible for any pre-1995 losses. The district court assumed, unsupported by evidence, that Leahy actually was a participant in the fraud before 1995. This does not suffice. *See McIntosh*, 198 F.3d at 999 ("We will reverse [a factual] finding only if the record contains no evidence providing a foundation for it.").

This conclusion also affects our last inquiry, the restitution amount. Leahy challenges both the method used to calculate the restitution amount, as well as the period covered. The first is rather easily disposed of. As stated previously, we

review the amount of restitution for abuse of discretion. *See Brierton*, 165 F.3d at 1139. The district court concluded the appropriate amount of restitution to the Insurance Council was $1.09 million, the total amount of the underpaid premiums. Leahy argues that the Insurance Council does not merit restitution because it received more in premiums than it paid out in claims, so it sustained no loss for restitution purposes. We disagree. The insurance companies were entitled to the benefit of their bargains– the amount of money they would have charged to insure the actual risk that Windy Labor presented. *See United States v. Garavaglia*, 5 F. Supp. 2d 511,520,522 (E.D. Mich. 1998), *affd*, 178 F.3d 1297 (6th Cir. 1999). Otherwise, Windy Labor would obtain a windfall through its fraud, receiving coverage for greater risks than the amount of premiums merited. The district court, therefore, did not err in the restitution order when it calculated the entire amount Windy Labor should have paid and subtracted what it did pay. The remainder returns the insurance companies to the positions they would have occupied absent the fraud. However, the restitution amount imposed on Leahy must be reduced consistent with our earlier finding regarding the length of his criminal participation.

III.

Duff used his associates to satiate his greed, taking advantage of a city's attempt to help minorities and women and abusing the trust of his insurers. The government properly

indicted Duff, Stratton, Dolan, and Leahy for various crimes, including wire and mail fraud, and the district court, by and large, conducted the trial of these complex and extensive matters admirably. We AFFIRM the convictions of all the defendants and the district court's evidentiary rulings. We REVERSE the district court's conclusion regarding the extent of Leahy's involvement with the insurance fraud and REMAND for re-calculation of the offense level and restitution amount consistent with this opinion.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court
Norther District of Illinois

UNITED STATES OF AMERICA	)	
	)	Case Number: 03-CR-922-7
v.	)	Judge: Elaine E. Bucklo
Terrence Dolan	)	

Francis C. Lipuma, Defendant's Attorney
Charles E. Ex, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT ENTERED A PLEA OF:
guilty to Count(s) 2 - 12 of the Second superseding indictment, which was accepted by the court.

Any remaining Count is is dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number (s)
18 U.S.C. § 1341 and 2	Scheme to commit mail fraud	12/30/2000	Two through 12

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**.

As to Count 2, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 3, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 4, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total

uninterrupted term of **21 months**. As to Count 5, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 6, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 7, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 8, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 9, the defendant is hereby committed to the custody ofthe United Stares Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 10, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 11, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**. As to Count 12, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **21 months**.

The Court recommends to the Bureau of Prisons:

That the defendant be allowed to serve his sentence at Oxford Prison Camp and that he be allowed to participate in an alcohol treatment program.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Count(s) 2 through 12 for a total period of 3 years of Supervised Release. This term consists 3 years on each of counts 2 through 12 and all such terms to run concurrent to each other.

Based on the defendant's inability to pay, the costs of incarceration are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § SDI.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

   The drug testing may not exceed more than 104 times per year

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004. The collection of DNA sample from defendant is authorized.

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hour of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall participate in a drug aftercare program approved by the probation officer, which may include residential program for treatment of a narcotic addiction or drug or alcohol dependency and/or testing for detection of substance use or abuse.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine
$1.100.00	Fine Waived
	Mandatory Costs
Restitution	of Prosecution
$20,000.00	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all

special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $20,000.00

The interest requirement on restitution is waived.

Joint and several for the full amount of restitution with co-defendant(s).

Co-Defendant's Name	**Case Number**	**Joint and Several Amount**
James Duff	03 CR 922-1	$20,000.00

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	**Restitution Ordered**	**Priority**
City of Chicago, Department of Revenue, City Hall, 121 North LaSalle St., Room 107, Chicago, IL 60602	$20,000.00	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above.

Pursuant to 18 U.S.C. § 3664(i), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.
- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shalt pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).
- Pursuant to 18 U .S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due all follows:

In full:
Due immediately.

In full:

The costs of incarceration and supervision are waived.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendants economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____ to _____

at_____.

By:_____
(Signature)

Name (Print)_____
Title (Print)_____

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2:00 P.M. on April 27, 2006.

Date of Imposition of Judgment/Sentencing: January 27,2006

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this
1st Day of February, 2006

United States District Court
Norther District of Illinois

UNITED STATES OF AMERICA	)	
	)	Case Number: 03-CR-922-1
v.	)	Judge: Elaine E. Bucklo
James M. Duff	)	

Terrence H. Campbell, Defendant's Attorney
Charles E. Ex, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT ENTERED A PLEA OF:

guilty to Count(s) 1 - 33 of the Second Superseding Indictment, which was accepted by the court.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number (s)
18 U.S.C. § 1962(d)	Conspiracy to commit racketeering and corrupt organizations	June 2002	one
18 U.S.C. § 1341 and 2	Scheme to commit Mail Fraud	June 2002	2-17, 19, 21 and 22
18 U.S.C. § 1343 and 2	Scheme to commit Wire Fraud	December 2001	18, 20 and 23
18 U.S.C. § 1956 (h)	Scheme to commit Money Laundering	June 2002	24
18 U.S.C. § 1956(a) (1) (B)(I) and 2	Laundering of Monetary Instruments	9/16/1999	25-30
26 U.S.C. § 7206(1)	False statement on an Income Tax Return	8/28/1998	31

26 U.S.C. § 7206(2)	Assist in preparation of a False Income Tax Return	8/25/2000	32-33

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **118 months.**

As to Count 1, 24 -30, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 118 months. As to Count 2-23, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 60 months. As to Count 31-33, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 36 months and all such terms to run concurrent to each other.

The Court recommends to the Bureau of Prisons:

That the defendant be allowed to serve his sentence at either Oxford or Yankton.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Count(s) 1- 33 to a period of 3 years of Supervised Release, said periods to run concurrent to each other.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Count 1-30 a period of 3 year(s) Supervised Release

Count 31-33 a period of 1 year(s) Supervised Release

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the

mandatory standard and discretionary conditions of supervised release that apply in this case.

MANDATORY CONDITIONS
OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § SDl.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court: The above drug testing condition is suspended based on the determination that the defendant poses a low risk of future substance abuse.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hour of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay

any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine
$3,300.00	Fine Waived
Restitution	Mandatory Costs of Prosecution
$12,026,582.02	$55,505.62

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $12,026,582.02

The interest requirement on restitution is waived.

Joint and several for the full amount of restitution with co-defendant(s).

Co-Defendant's Name	**Case Number**	**Joint and Several Amount**
John J. Leahy	03 CR 922	1,093,566.00
William E. Stratton	03 CR 922	7,370,739.00

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	**Restitution Ordered**	**Priority**
NCCI, Administration for National workers, Compensation Reinsurance Pool, C/o state of Illinois, Department of Insurance, Residual Market/Assigned Risk Workers' Compensation Plan, 901 Peninsula Corporate Circle, Bocca Raton, FL 33487	$1,093,566.00	
City of Chicago, Department of Revenue, City Hall, 121 North LaSalle St., Room 107, Chicago, IL 60602	$10,933,016.02	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(i), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided

or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation. Based on the defendant's inability to pay, the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.
- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.
- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to

penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U .S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:
Due immediately.

In full:

The costs of incarceration and supervision are waived.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendants economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2:00 P.M. on July 18, 2005.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____ to _____

at_____.

By:_____
(Signature)

Name (Print)_____
Title (Print)_____

Date of Imposition of Judgment/Sentencing: May 18, 2005

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this
27th Day of May, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITES STATES	)	
OF AMERICA	)	No. 03 CR 922-1
	)	
v.	)	Honorable
	)	Elaine E. Bucklo
JAMES M. DUFF	)	

PRELIMINARY ORDER OF FORFEITURE

This cause comes before the Court on motion of the United Slates for entry of a preliminary order of forfeiture as to specific property pursuant to the provisions of Title 18, United States Code, Section 1963, Title 18, United States Code, Section 982, and Fed. R. Crim. P. 32.2. and the Court being fully informed hereby finds as follows:

(a) On July 22, 2004, a second superseding indictment was returned charging defendant JAMES M. DUFF with a violation of the Racketeer Influenced Corrupt Organizations Act pursuant to the provisions of 18 U.S.C. § 1962(d) and Money Laundering violations pursuant to the provisions of 18 U.S.C § 1956;

(b) The second superseding indictment sought forfeiture to the United States of specific property pursuant to

the provisions of 18 U.S.C. § 1963(a)(1), (a)(2), and (a)(3) and 18 U.S.C. § 982(a)(1);

(c.) On January 10, 2005, defendant JAMES M. DUFF entered a voluntary plea of guilty to the charges in the second superseding indictment, thereby making certain property subject to forfeiture pursuant to 18 U.S.C. § 1963(a)(1), (a)(2), and (a)(3) which states in part:

> (a) Whoever violates any provision of section 1962 of this chapter ... shall forfeit to the United States:
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any-
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established. operated, controlled, conducted, or participated in the conduct of. in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly. from racketeering activity or unlawful debt collection in violation of section 1962.

(d) Further, additional property is subject to forfeiture pursuant to pursuant to 18 U.S.C. § 982(a)(1), which states in part:

> (a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, ... shall order that the person forfeit to the United States, any property real or personal, involved in such offense, or any property traceable to such property.

(e) As a result of his violation of 18 U.S.C. § 1962(d), to which defendant JAMES M. DUFF pled guilty. the Court shall order the interests of the defendant, jointly and severally with co-defendant William E. Stratton, including but not limited to, at least $10,000,000, and interests and proceeds traceable thereto, including but not limited to the real property commonly known as 174-182 North Halsted, Chicago, Illinois and legally described as follows:

> LOTS 1 AND 2 IN BLOCK 36 IN CARPENTER'S ADDITION TO CHICAGO, IN THE SOUTHEAST 1/4 OF SECTION 8, TOWNSHIP 39 NORTH, RANGE 14 EAST

OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Permanent Real Estate Index Numbers: 17-08-434-004-0000, 17-08-434-005-0000 & 17 -08-434-006-0000

pursuant to the provisions of 18 U.S.C. § 1963(a)(l), (a)(2), and (a)(3);

(f) Further, as a result of defendant JAMES M. DUFF's violations of 18 U.S.C. § 1956, to which he also pled guilty, the Court shall order the interests of defendant JAMES M. DUFF, jointly and severally with co-defendant William E. Stratton, in property involved in the offense or property traceable to such thereto; including but not limited to funds in the amount of $3,024,000 pursuant to the provisions of 18 U.S.C. § 982(a)(1);

(g) Defendant JAMES M. DUFF is scheduled to be sentenced on May 16, 2005;

(h) Before or at the time of sentencing, the United States requests that this Court enter a preliminary order of forfeiture against the defendant, for which is he liable, which will include all property, interests and proceeds traceable to violations of 18 U.S.C. § 1962(d) and property involved in the offense or property traceable to violations of 18 U.S.C. §1956;

(i) If any of the funds in the amounts of the $10,000,000 and $3,024,000 and money judgments entered against defendant JAMES M. DUFF as a result of any act or omission of the defendant:

1. cannot be located upon the exercise of due diligence;
2. has been transferred or sold to, or deposited with a third party;
3. has been place beyond the jurisdiction of the Court;
4. has been substantially diminished in value, or
5. has been commingled with other property which cannot be divided without difficulty;

the United States shall request that this Court order the forfeiture of any other property belonging to defendant JAMES M. DUFF up to the value of the money judgment entered against the defendant pursuant to 18 U.S.C. § 1963(m), 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. 981(b)(1). and Fed R. Crim. P. 32.2, in order to satisfy the money judgment entered by the Court;

(j) Should additional assets become available to satisfy the forfeiture judgment, the United States shall at that time file a motion for substitution of assets before this Court requesting permission to seize such assets and publish notice fo the United States' intent to forfeit the property in

satisfaction of the forfeiture money judgment entered by the Court, pursuant to the provisions of 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b)(l);

(k) The United States requests that the terms and conditions of this preliminary order of forfeiture entered by the Court be made part of the sentence imposed against defendant JAMES M. DUFF and included in any judgment and commitment order entered in this case against him.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1 That, pursuant to the provisions of i8 U.S.C. § 1963(a)(1), (a)(2), and (a)(3), 18 U.S.C. § 982(a)(l), and Fed R. Crim. P.32.2, all right, title and interest defendant JAMES M. DUFF has, jointly and severally with his co-defendant William Stratton, in the funds in the amounts of $10,000,000 and $3,024,000 and the real property commonly known as 174-182 North Halsted, Chicago, Illinois is hereby forfeited to the United States of America for disposition according to law. The property is legally described as follows:

LOTS 1 AND 2 IN BLOCK 36 IN CARPENTER'S ADDITION TO CHICAGO, IN THE SOUTHEAST 1/4 OF SECTION 8, TOWNSHIP 39 NORTH. RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Permanent Real Estate Index Numbers: 17-08-434-:004-0000, 17-08-434-005-0000 & 17-08-434-006-0000

2. That, by an act or omission on the part of defendant JAMES M. DUFF, funds in the amounts of $10,000,000 and $3,024,000 cannot be located to satisfy the forfeiture judgment; pursuant to the provisions of 18 U.S.C. § 1963(m), 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. 981(b)(1), and Fed R. Crim. P. 32.2, the United States has the authority to forfeit substitute assets to satisfy the money judgments entered by this Court;

3. That, pursuant to the provisions of 18 U.S.C. § 1963(e), the United States Marshal Service shall seize and take custody of the of the real property for disposition according to law;

4. That, pursuant to the provisions of 18 U.S.C. § 1963(1)(1), the United States Marshal Service shall publish notice of this order and of its intent to dispose of the property according to law. The government may also, to the extent practicable, pursuant to statute, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the preliminary order of forfeiture as a substitute for published notice as to those persons so notified;

5. Pursuant to the provisions of 18 US.C. § 1963(1)(2), if following notice as directed by 18 U.S.C. §

1963(l)(1), any person other than the defendant, asserts an interest in the property that has been ordered forfeited to the United States, within thirty days of the final publication of notice or this receipt of notice under paragraph four (4), whichever is earlier and petitions the Court for a hearing to adjudicate the validity of this alleged interest in the property, the government shall request a hearing. The hearing shall be held before the Court alone, without a jury;

6. Following the Court's disposition of all third parties interests, the Court shall, upon the government's motion, if appropriate, enter a final order of forfeiture. as to the property which is the subject of the this preliminary order of forfeiture, which shall vest clear title in the United States of America;

7. The terms and conditions of this preliminary order of forfeiture are part of the sentence imposed against defendant JAMES M. DUFF and included in any judgment and commitment order entered in this case against him;

8. This Court shall retain jurisdiction in this matter to take additional action and enter further orders as necessary to implement and enforce this forfeiture order.

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
United States District Judge

Dated: 05/27/05

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
v.	)	No. 03 CR 922
JAMES M. DUFF *Defendant.*	)	

MEMORANDUM OPINION

James Duff was charged in a 33 count indictment with engaging in a racketeering conspiracy under 18 U.S.C. sec. 1962(d) involving fraud against the city of Chicago, another fraud scheme involving Workmen's Compensation insurance, and money laundering. He was also charged with tax fraud. Mr. Duff pled guilty to all charges shortly before his trial was to begin. I held a three-day sentencing hearing in his case on May 16-18, 2005 and ultimately sentenced Mr. Duff to 118 months in the custody of the Bureau of Prisons. This memorandum is written for the purpose of explaining the factors that entered into my decision as to Mr. Duff's sentence.

Mr. Duff was indicted in September, 2003, along with six others who were alleged to have participated with Mr. Duff in various criminal activity. Trial was set for October 4,

2004, but reset to January 24, 2005 on Mr. Duff's motion. On December 24, 2004, Mr. Duff notified the Government that he wanted to plead guilty. When he appeared for his guilty plea, however, on January 6, 2005, he attempted to plead to a factual statement that did not encompass the charges brought by the Government. On January 10, 2005, he again appeared before the court and in a plea colloquy that took four hours due to his reluctance to admit to the facts that would sustain the charges, eventually pled guilty to the charges in the superceding indictment. Trial of four of the other defendants began on January 24, 2005. The jury returned a verdict of guilty as to all but one of these defendants on February 24, 2005. One of the remaining defendants, who was ill, is scheduled for trial this fall. The last defendant was Mr. Duff's mother, Patricia Duff. She was dismissed when it was determined that she was not competent to stand trial.

In summary, the indictment to which Mr. Duff pled guilty charged, and the evidence demonstrated, that Mr. Duff obtained in excess of $100,000,000 in contracts from the City of Chicago that had been set aside for minority and women owned businesses by falsely representing that two companies actually owned and controlled by him were owned and operated either by his mother or another defendant, William Stratton. Neither of these defendants in fact had control or operated either business. Mr. Stratton, an African American, was essentially the chauffeur and companion of Mr. Duff's father. His mother had nothing to do with the business. To

disguise his actual ownership and control of these businesses, Mr. Duff created another company to which he diverted millions of dollars in proceeds from the City contracts. He pled guilty to money laundering charges in connection with this conduct. In a second fraudulent scheme, Mr. Duff over a long period of time misled and concealed from insurance companies the fact that most of the workers employed by his companies were manual laborers, which required a higher workman's compensation premium, rather than clerical workers, which he represented the workers to be. Mr. Duff also pled guilty to income tax fraud involving two of his companies over a three-year period.

The principles involved in determining Mr. Duff's sentence are directed by *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In that case the Supreme Court held that the United States Sentencing Guidelines must be "merely advisory" in order to avoid violating the Sixth Amendment to the United States Constitution, and that the trial judge retains "broad discretion in imposing a sentence within a statutory range." *Id.* at 750. In addition to considering the Sentencing Guidelines, I am to consider the factors listed in 18 U.S.C. § 3553(a).

The Government and Mr. Duff disagreed over the appropriate Guidelines Manual that should be considered in this case. While the Government agreed that the 1998 Manual would be applicable to Mr. Duff's co-defendants, it argued that because he continued to reap the benefits of the

City fraud and to divert money from the companies involved in the City fraud to a separate company through 2001, the 2001 Manual should apply. I concluded that since his companies had been "decertified" as minority/women owned businesses before this time, I would look at the 1998 Manual in considering his sentence.

Mr. Duff's three-day sentencing hearing was largely consumed with an attempt to determine "loss" under the Sentencing Guidelines. The first "loss" issue involved the harm caused by Mr. Duff successfully defrauding the City of Chicago out of more than $100,000,000 in contracts. The Probation Department determined that the amount of loss involving this fraud was $112,406,580, which was the value of the benefits diverted from the City's WBE/MBE set aside program. The Government supported this position, arguing that USSG sec. 2F1.1, Application Note 8(d) in the 1998 Guideline Book, or 2(F) (ii), Special Rules, to USSG sec. 2B1.1 (2001 Book), both provide that "loss is the value of the benefits diverted from intended recipients or uses" (1998 Book) or "in the case involving Government benefits (...entitlement programs), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, ..." (2001 Book). Mr. Duff contended that his company performed the work under the contract and that therefore there was no loss at all. The position of the Probation Department and the Government is supported by *United States v. Brothers Const.*

Co. of Ohio, 219 F.3d 300 (4th Cir. 2000). In *Brothers*, like this case, a contractor obtained contracts intended for minority owned businesses by fraudulently misrepresenting the ownership of his company. The Fourth Circuit upheld the district court's determination that loss should be the amount of the contract. I nevertheless held that for purposes of determining a Guideline "loss" I would rely on Seventh Circuit authority which has held that loss is equal to the contract price minus the benefit provided, which in this case I determined to be the profit on the contracts.[1] I did, however,

---

[1] *E.g., United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). In *Schneider*, the Government failed to prove any loss in a case in which a contract was performed. In this case, even if Mr. Duff's argument were accepted that the City got the value of the cleaning services for which it contracted, the profit to Mr. Duff is not a value given the City and the Government reasonably proved this amount as loss in this case. In writing this opinion, I am less convinced that I was correct in determining "loss" not to be the entire amount of the contract. *Schneider* did not involve a minority/women set aside program in which the contract amounts represent business to be provided to historically disadvantaged groups. The loss of that money for those programs exists whether or not the City obtained services. Under the Guidelines, the preferable route might have been to follow *Brothers*, but to consider a reduction as a downward departure. *United States v. Lane*, 323 F.3d 568, 588 (7th Cir. 2003) ("Once the amount of the loss is calculated under the guidelines, the court has the discretion to modify the amount of loss to more accurately

take loss in the larger amount of the contract diversion into account in determining the appropriate sentence under 18 U.S.C. sec. 3553, as noted during sentencing and discussed further below. With regard to the amount of the profit, the Government and Mr. Duff put on evidence. I agreed with the Government's determination for reasons stated during the sentencing hearing and calculated the profit as $10,933,000.

Loss was also calculated on Mr. Duff's insurance scheme. The Probation Department concluded that this loss was the amount of unpaid workers' compensation insurance premiums. The Government agreed with this approach. Mr. Duff maintained that at most this was $300,000 (arguing that since premiums exceeded paid claims there was really no loss). I concluded that the Government's evidence was more persuasive and its expert more credible than Mr. Duff's and determined that the loss, after offsets for revised experience modifiers, was approximately $1,093,000. I also heard testimony with respect to the loss on the tax counts and giving Mr. Duff the benefit of the doubt as to the meaning of certain provisions under the Guidelines, allowed him credit for the tax payments made by others to the federal Government. (While he improperly deducted as salaries millions of dollars

---

reflect the economic realities of the crime.") But as stated above, I did take the larger amount into consideration in determining a reasonable sentence under *United States v. Booker*.

that went to family members which were in reality gifts, they paid income tax on the amounts. The Government belatedly attempted to show that lost gift tax was not paid, which would have changed the equation, but I concluded that there was insufficient evidence of the amount that should have been paid.) As a result, for purposes of the Guidelines, I limited loss to the base offense level (increased to level 12 under § 2T1. 1 (b) (1)) .

At the sentencing hearing I made various other Guidelines rulings: that each scheme involved more than minimal planning, that the offense conduct (other than the tax scheme) involved sophisticated means, that Mr. Duff was a leader and organizer and that the insurance scheme victimized 50 or more insurance companies.

The Government objected to any reduction for acceptance of responsibility. As noted above, Mr. Duff's initial attempt to plead "guilty" was based on a factual statement that was a blatant attempt to avoid conviction on most of the charges. When I rejected that attempt, he did enter into a plea to the actual charges in this case, but his plea took hours due to his efforts to admit the very fewest facts that I and the Government would find necessary for a valid plea. At the sentencing hearing, Mr. Duff presented the testimony of two experts, one of whom I did not find credible, and one of whom was not provided evidence by Mr. Duff that the expert agreed was relevant to his opinion. At the hearing, Mr. Duff's attitude, expressed through the expert opinions

and arguments of his attorneys, continued to be that no one had really been hurt by his fraudulent conduct or tax evasion. He continued to argue that no one else could competently have done the work his companies did for the City. He also continued to take the position that Mr. Stratton and family members were paid for actual work, contrary to the evidence in this case. Although Mr. Duff gave a prepared speech just before sentencing, it was clear to me throughout Mr. Duff's Sentencing hearing that, while like most defendants he is very sorry that he will have to pay the consequences of his actions and is sorry that his family will be hurt, he has never accepted moral responsibility for any wrongdoing.

The Seventh Circuit has held "that in the absence of evidence of sincere remorse or contrition for one's crimes, a guilty plea entered for the apparent purpose of obtaining a lighter sentence does not entitle a defendant to a reduction for acceptance of responsibility." *United States v. Hammick,* 36 F.3d 594, 600 (7th Cir. 1994). "Rather than relying solely on the defendant's guilty plea to award the reduction, the sentencing judge is required to look beyond formalistic expressions of culpability and to determine whether the defendant has manifested an acceptance of personal responsibility for his offense in a moral sense." *Id.* The judicial inquiry "is a search for expiatory deeds and, failing those, ... for conscience." *Id., quoting from United States v. Baserra,* 967 F. 2d 254, 256 (7th Cir. 1992). A defendant can be required to "provide a complete and credible explanation

of the conduct involved in the offense of conviction." *Hammick* at 599. The defendant has the "burden of demonstrating that he has actually accepted responsibility for his actions." *United States v. Taliaferro,* 211 F.3d 412, 414 (7th Cir. 2000). Lies and frivolous denial of relevant conduct that the court has concluded is true is inconsistent with acceptance of responsibility. *Id.;* 1998 Guidelines, § 381.1, application note l(a).

Mr. Duff argued that given his guilty plea I had no discretion to deny him acceptance of responsibility, citing *United States v. Carroll,* 346 F.3d 744 (7th Cir 2003). In *Carroll* the Court of Appeals concluded that the district court erred in concluding that a defendant had obstructed justice and in otherwise denying acceptance of responsibility, noting the defendant had participated in numerous proffer sessions in which he had described his illegal conduct in detail. The language of the opinion, however, can be read to deny discretion to deny acceptance of responsibility in any case in which a defendant provides a "bare-bones" description of guilt. *Id.* at 750. While I believe that interpretation would be a change from the approach and discretion noted in the cases discussed above, I stated at the sentencing hearing that it is possible that under *Carroll,* on these facts if I were limited to the Sentencing Guidelines that I could not deny the Guideline reduction for acceptance of responsibility despite my belief that his guilty plea is simply "spin control." Since this sentence, under *Booker,* is not limited to consideration of a

narrow range following a strict determination of points under a particular Guidelines Manual, however, I considered the sentencing range that would be applicable with or without acceptance of responsibility. *See United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005) I in which the court indicated that in post-*Booker* sentences, there is leeway to consider more than one Guideline range under alternative factual determinations.

Booker requires that I consider and specifically look at the factors listed in 18 U.S.C. sec. 3553(a) in determining the appropriate sentence. Foremost among my consideration was the directive that that the sentence be "sufficient but not greater than necessary, to comply with the purposes set forth" in paragraph 2 of the paragraph. Those include the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; ... to afford adequate deterrence to criminal conduct;... to protect the public from further crimes of the defendant ...." The statute also directs me to consider the nature and circumstances of the defendant and the kinds of sentences available.

I first looked at the seriousness of Mr. Duff's offense. Mr. Duff's wrongdoing was extensive. His fraud on the City of Chicago and on the insurance companies each took place over many years. As the City noted in a letter to the court in connection with Mr. Duff's sentencing hearing, Mr. Duff's actions in obtaining over $100,000,000 in City contracts

under the false pretense that his companies Were minority or women owned and run harmed the credibility of the City's programs, and of course the opportunities for minority/women owned businesses to gain entry and experience in the marketplace. Mr. Duff, out. of pure greed, successfully enriched himself and his family, and to the extent of more than $100,000,000 in contracts, prevented legitimate minority/women owned businesses from developing their own experience, credibility, employees, and livelihood. At the same time Mr. Duff was engaged in defrauding the City of Chicago, he engaged in a twelve-year fraud in connection with workmen's compensation insurance. In that scheme, Mr. Duff succeeded for many years in paying low cost premiums for clerical workers while he in fact employed much higher risk manual laborers. Mr. Duff was also guilty of income tax fraud over a three-year period.

Mr. Duff's criminal conduct is worse because of the people he corrupted. Six people were indicted with Mr. Duff. Three have been found guilty, one is set for a later trial, and his own mother failed to stand trial only because of her deteriorating health. In addition five others who testified at trial were given immunity from prosecution because of their cooperation but were clearly participants in his illegal ventures. Mr. Duff corrupted (obviously, with their cooperation) all of the people found guilty or given immunity.

In sentencing Mr. Duff for these crimes, I was also required to consider the need for the sentence "to promote

respect for the law, and .to provide just punishment for the offense; ... to afford adequate deterrence to criminal conduct; ... to protect the public from further crimes of the defendant...." It was clear that a substantial sentence was required to deter others from engaging in similar fraud, to punish the lengthy and extensive criminal conduct, and to promote respect for the law. I also believed that a substantial sentence was necessary to deter further crimes by Mr. Duff. His criminal actions, covering a multitude of victims, statutes and schemes, went on for a decade or more.

Section 3553 also requires that I consider the nature and circumstances of the defendant. At sentencing, as is common, letters written in support of Mr. Duff indicated he is a good family man. But the crimes to which Mr. Duff pled guilty, and the testimony heard at trial that implicated him, paint a different picture of Mr. Duff.[2] Mr. Duff's actions were not driven by any even perceived necessity. Motivated purely by greed, he was willing to risk harm to all those who worked with him, commanding them to participate in his conduct, and even requiring criminal conduct by his mother. At trial, there were witnesses who were clearly afraid of Mr.

---

[2]The sentencing was delayed several times so that both of Mr. Duff's attorneys would have the opportunity to read the trial transcript. While they indicated prior to the sentencing hearing that they intended to refute specific "untrue" trial testimony, no evidence at the sentencing gives me any reason to doubt the facts noted here.

Duff, and there was testimony that he threatened physical harm to at least one witness and his family when he believed the witness might stand in the way of his obtaining the City contracts.

After considering each of these factors; and the advisory Guidelines, I concluded that a sentence of 118 months was sufficient, but not greater than necessary" to satisfy the concerns expressed in the statute. The sentence also included restitution, the imposition of costs, and a term of supervised release.

ENTER ORDER:
/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: May 27, 2005

United States District Court
Norther District of Illinois

UNITED STATES OF AMERICA	)	
	)	Case Number: 03-CR-922-2
v.	)	Judge: Elaine E. Bucklo
William E. Stratton	)	

Michael D. Sher, Defendant's Attorney
Charles E. Ex, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) 1, 13-15, 22, 24-29 of the Second Superseding Indictment.

All Counts in the original and superseding indictments are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number (s)
18 U.S.C. § 1962(d)	Conspiracy to commit racketeering and corrupt organizations	June 2002	one
18 U.S.C. § 1341 and 2	Scheme to commit Mail Fraud	June 2002	13-15, and 22
18 U.S.C. § 1956(h) and 18 U.S.C. § 1956(a)(1)(B)(i) and 2	Scheme to commit Money Laundering	9/16/1999	24-29

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 70 months.

As to Count 1, 24-29, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 70 months. As to Count 13 - 15 and 22, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of 60 months. All such terms to run concurrent to each other.

The Court recommends to the Bureau of Prisons:

That the defendant be allowed to serve his sentence at Oxford, Wisconsin.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Count(s) 1, 24-29, 13-15 and 22 to a period of 3 years of Supervised Release, said periods to run concurrent.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Count	1, 24-29, 13-15 and 22	a period of	3 years year(s) Supervised Release

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition. see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

MANDATORY CONDITIONS
OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § SDl.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;
2) for any offense, the defendant shall not unlawfully possess a controlled substance;
3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful

use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court: The above drug testing condition is suspended based on the determination that the defendant poses a low rick of future substance abuse.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004. The collection of DNA sample from defendant is authorized.

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hour of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine
$1.100.00	Fine Waived
Restitution	Mandatory Costs of Prosecution
$7,370,739.00	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $7,370,739.00

The interest requirement on restitution is waived.

Joint and several for the full amount of restitution with co-defendant(s).

Co-Defendant's Name	**Case Number**	**Joint and Several Amount**
James M. Duff	03 CR 922	$7,370,739.00

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	**Restitution Ordered**	**Priority**
City of Chicago, Department of Revenue, City Hall, 121 North LaSalle St., Room 107, Chicago, IL 60602	$7,370,739.00	

If the dcfendant makes a partial payment, eaeh payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(i), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with rcspect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation. Based on the defendant's inability to pay the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution

interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.
- Unless waived, the defendant shalt pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).
- Pursuant to 18 U .S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:
Due immediately.

In full:

The costs of incarceration and supervision are waived.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendants economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2:00 P.M. on July 20, 2005.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on_____ to _____

at_____.

By:_____
(Signature)

Name (Print)_____
Title (Print)_____

Date of Imposition of Judgment/Sentencing: May 20, 2005

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this
25th Day of May, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITES STATES OF AMERICA	)	No. 03 CR 922
v.	)	Honorable Elaine E. Bucklo
WILLIAM E. STRATTON	)	

PRELIMINARY ORDER OF FORFEITURE

This cause comes before the Court on motion of the United States for entry of a preliminary order of forfeiture as to specific property pursuant to the provisions of Title 18, United States Code, Section 1963 and Fed. R. Crim. P. 32.2, and the Court being fully informed hereby finds as follows:

(a) On July 22, 2004, a second superseding indictment was returned charging defendant WILLIAM E. STRATTON with a violation of the Racketeer Influenced Corrupt Organizations Act pursuant to the provisions of 18 U.S.C. § 1962(d);

(b) The second superseding indictment sought forfeiture to the United States of specific property pursuant to the provisions of 18 U.S.C. § 1963(a)(1), (a)(2), and (a)(3);

(c) Beginning on January 25,2005, a jury trial was held before this Court;

(d) On February 24, 2005, the jury returned a verdict of guilty against defendant on Count One of the second superseding indictment, thereby making certain property subject to forfeiture pursuant to the provisions of 18 U.S.C. § 1963(a)(l), (a)(2), and (a)(3);

(e) Defendant WILLIAM E. STRATTON waived his right to have the forfeiture allegations in the second superseding indictment considered by the jury. It was agreed instead that this Court would consider the issues relating to the forfeiture;

(f) During the defendant's sentencing hearing on May 20, 2005, the Court found defendant WILLIAM E. STRATTON liable for the sum of $529,932, as property, interests and proceeds traceable to violations of 18 U.S.C. § 1962(d), and interests and proceeds traceable thereto, including but not limited to the real property commonly known as 174-182 North Halsted, Chicago, Illinois and legally described as follows:

> LOTS 1 AND 2 IN BLOCK 36 IN CARPENTER'S ADDITION TO CHICAGO, IN THE SOUTHEAST 1/4 OF SECTION 8, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

(g) If any of the funds in the amount of the money judgment entered against defendant WILLIAM E.

STRATTON as a result of any act or omission of the defendant:

1. cannot be located upon the exercise of due diligence;
2. has been transferred or sold to, or deposited with a third party;
3. has been place beyond the jurisdiction of the Court;
4. has been substantially diminished in value, or
5. has been commingled with other property which cannot be divided without difficulty;

the United States shall request that this Court order the forfeiture of any other property belonging to defendant WILLIAM E. STRATTON up to the value of the money judgment entered against the defendant pursuant to 18 U.S.C. § 1963(m) and Fed R. Crim. P. 32.2, in order to satisfy the money judgment entered by the Court;

(h) Should additional assets become available to satisfy the forfeiture judgment, the United States shall at that time file a motion for substitution of assets before this Court requesting permission to seize such assets and publish notice fo the United States' intent to forfeit the property in satisfaction of the forfeiture money judgment entered by the Court, pursuant to the provisions of 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b)(1);

(I) The United States requests that the terms and conditions of this preliminary order of forfeiture entered by the Court be made part of the sentence imposed against defendant WILLIAM E. STRATTON and included in any judgment and commitment order entered in this case against him.

Accordingly, it is hereby ORDERED. ADJUDGED and DECREED:

1. That a judgment is entered against defendant WILLIAM E. STRATTON in the amount of $529,932;

2. That pursuant to the provisions of 18 U.S.C. § 1963(a)(1), (a)(2), and (a)(3) and Fed R. Crim. P. 32.2, all right, title and interest defendant WILLIAM E. STRATTON has, jointly and severally with his co-defendant James M. Duff, in and the real property commonly known as 174-182 North Halsted, Chicago, Illinois and funds in the amount of $529,932 is hereby forfeited to the United States of America for disposition according to law. The property is legally described as follows:

> LOTS 1 AND 2 IN BLOCK 36 IN CARPENTER'S ADDITION TO CHICAGO, IN THE SOUTHEAST 1/4 OF SECTION 8, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

3. That, pursuant to the provisions of 18 U.S.C. § 1963(e). the United States Marshal Service shall seize and take custody of the of the foregoing real property for disposition according to law;

4. That, pursuant to the provisions of 18 U.S.C. § 1963(1)(1), the United States Marshal Service shall publish notice of this order and of its intent to dispose of the property according to law. The government may also, to the extent practicable, pursuant to statute, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the preliminary order of forfeiture as a substitute for published notice as to those persons so notified;

5. Pursuant to the provisions of 18 U.S.C. § 1963(1)(2), if following notice, any person other than the defendant, asserts an interest in the property that has been ordered forfeited to the United States, within thirty days of the final publication of notice or this receipt of notice under paragraph four (4), whichever is earlier and petitions the Court for a hearing to adjudicate the validity of this alleged interest in the property, the government shall request a hearing. The hearing shall be held before the Court alone, without a jury;

6. Following the Court's disposition of all third parties interests, the Court shall, upon the government's motion, if appropriate. enter a final order of forfeiture as to the property which is the subject of this preliminary order of

forfeiture, which shall vest clear title in the United States of America;

7. The terms and conditions of this preliminary order of forfeiture are part of the sentence imposed against defendant WILLIAM E. STRATTON and included in any judgment and commitment order entered in this case against him;

8. This Court shall retain jurisdiction in this matter to take additional action and enter further orders as necessary to implement and enforce this forfeiture order.

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
United States District Judge

Dated: 05/25/05

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 922-2,4,&5	DATE	4/25/2005
CASE TITLE	USA vs. Stratton, et al		

DOCKET ENTRY:

Defendants' motion for a new trial, to arrest judgment, and their motions for judgment of acquittal are denied.

Docketing to mail notices

Courtroom Deputy Intitials:	MPJ

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 922-all	DATE	1/10/2005
CASE TITLE	USA vs. Duff, et al		

[In the following box (a) indicate the party filing the motion, e.g. plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due____.

(3) ☐ Answer brief to motion due___.
Reply to answer brief due___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury tiral][Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP4(m ☐ Local Rule 41.1
☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Defendants' renewed motion to dismiss (136-1) is denied.

(11) ☐ [For further details see order (on reverse side of/attached to) this original minute order.]

	No notices required, advised in open court		number of notices	Doc #
	No notices required.			166
	Notices mailed by judge's staff.		Jan 13 2005 date docketed	
	Notified counsel by telephone			
✓	Docketing to mail notices.		docketing deputy initials	
	Mail AO 450 form			
	Copy to judge/magistrate judge		date mailed notice	
MPJ	courtroom deputy's initials	Date/ time received in central Clerk's office	mailing deputy initials	

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 922-1,2,3&7	DATE	9/21/2004
CASE TITLE	USA vs. Duff, et al		

[In the following box (a) indicate the party filing the motion, e.g. plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due____.

(3) ☐ Answer brief to motion due___.
Reply to answer brief due___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury tiral][Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP4(b) ☐ Local Rule 41.1
☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Defendant's motion to dismiss counts 2-15 and 24-30 of the second superseding indictment is denied. Enter Memorandum Opinion and Order.

(11) ■ [For further details see order (on reverse side of/attached to) this original minute order.]

	No notices required, advised in open court		number of notices	Doc #
	No notices required.			122
✓	Notices mailed by judge's staff.		Sep 22 2004 date docketed	
	Notified counsel by telephone			
	Docketing to mail notices.		docketing deputy initials	
	Mail AO 450 form			
	Copy to judge/magistrate judge		9/21/2004 date mailed notice	
MPJ	courtroom deputy's initials	Date/ time received in central Clerk's office	MPJ mailing deputy initials	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
v.	)	No. 03 CR 922
JAMES M. DUFF, PATRICIA GREEN DUFF, WILLIAM E. STRATTON, JOHN J. LEAHY, EDWARD WISNIEWSKI, STARLING ALEXANDER, AND TERRENCE DOLAN, *Defendants.*	)	

MEMORANDUM OPINION AND ORDER

Defendants James M. Duff, William E. Stratton, Patricia Green Duff, and Terrence Dolan move to dismiss counts 2-15 and 24-30 of the second superseding indictment (the "indictment").

The indictment charges defendants with conspiracy, racketeering, mail fraud, wire fraud, and money laundering. The motion is addressed only to the mail fraud and money laundering charges. The indictment charges that defendants conspired among themselves and with others, both named and

unnamed, to defraud the City of Chicago (the City) by falsely representing that certain entities, which were in fact owned and managed by Mr. Duff, were qualified as Minority-Owned Businesses ("MBE's") or Women-Owned Businesses ("WBE's") under Chapter 2-92-420 et seq. of the amended Municipal Code of the City of Chicago. The Municipal Code's provisions are designed to provide set-asides for MBE's and WBE's in connection with large contracts let by the City for competitive bidding. In order to qualify for the set-asides, businesses must be at least 51% owned and controlled by one or more minorities or women.

For purposes of the motion to dismiss, the well-pleaded allegations of the indictment must be taken as true. *United States v. Yaskas*, 166 F.3d 873, 880 (7th Cir.1999).

The charging allegations are numerous and specific. Using the charges that involve just two of the Duff businesses as examples, the allegations may be summarized as follows. Windy City Maintenance, Inc. was certified as a WBE in 1991 on the basis of a sworn affidavit and certain other statements made by Patricia Green Duff to the effect that she was the real owner and controlled the operations of Windy City Maintenance. In fact, Ms. Green Duff, who is the mother of James M. Duff, was not the real owner of the business; it was owned and controlled by Mr. Duff. In 1994, Remedial Environmental Manpower, Inc. (REM), was qualified by the City as an MBE on the basis of a sworn affidavit and other

statements of Mr. Stratton, an African-American, who claimed that he was the real owner and controlled the operations of REM. In fact, Mr. Duff, not Mr. Stratton, owned and controlled REM. Similar allegations are made with respect to the other Duff-owned businesses.

The indictment charges the pattern of deceit did not end with the initial qualification of the entities; on-going compliance requirements of the Municipal Code were flouted by similar deceptions made in subsequent years. As a result, the entities specifically mentioned above, together with other Duff-owned and controlled businesses, obtained direct contracts and sub-contracts worth more than 100 million dollars and generated payments and distributions for the benefit of the named defendants and other relatives and associates of Mr. Duff aggregating more than nine million dollars.

I.

Counts 2-15 allege the facts summarized above and the use of the mails in connection with the scheme described. Mail fraud is established as a federal crime by 18 U.S.C. § 1341, which provides in relevant part:

> (W)hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... for the purpose of executing such scheme..., places in any ... authorized depository for mail matter, any

> matter or thing whatever to be sent or delivered by the Postal Service, ... or takes or receives therefrom, any such matter or thing, ... shall be fined under this title or imprisoned not more than 20 years, or both ....

In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that the "scheme or artifice to defraud" and "obtaining money or property" clauses of § 1341 were to be construed conjunctively rather than disjunctively. *McNally* further held that § 1341 does not reach the intangible rights of the citizenry to good government. *McNally*, 483 U.S. at 356.

Defendants' principal argument is that because the City's only interest in the set-aside program's qualification provisions is purely regulatory and cannot be deemed "property," no offense has been stated. They insist that under *McNally* and subsequent cases the "property" obtained by scheme or artifice to defraud must have an economic or pecuniary value.

McNally involved a scheme by which state officials were alleged to have defrauded the Commonwealth of Virginia when they failed to advise other Commonwealth officers that they had pressured the primary broker for the Virginia workmen's compensation insurance program into splitting commissions on insurance with an entity the defendants owned. However, no moneys of the state were involved, because the premiums were actually paid by private parties. *McNally*, 483 U.S. at 360. The possibility that a

different result would obtain in a case where the victim had been deprived of exercising control over how its money should be spent was expressly recognized. Justice White, writing for the majority, held that loss of money or property was an essential element of a violation of § 1341, but noted specifically that

> Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.

McNally, 483 U. S. at 360. A few months after the decision in *McNally*, in *Carpenter v. United States*, 484 U.S. 19, 25 (1987), a unanimous Court held that *McNally* did not dictate reversal of mail fraud convictions arising from a scheme by a Wall Street Journal reporter to deprive his employer of its property right to exclusive use of information it had collected prior to public disclosure. The Court expressly rejected the argument that § 1341 could only be applied to schemes involving the deprivation of tangible property.

Cleveland v United States, 531 U.S. 12, 19 et seq. (2000), on which Defendants also rely, is distinguishable from the case at bar. In *Cleveland*, the defendants had obtained by fraud a license to operate video poker machines. The Court held that such a license was not "property" in the government regulator's hands, and that, "Such regulations are paradigmatic exercises of the States' traditional police

powers." 531 U.S. at 23. It distinguished the regulatory interest of a state from "an interest that 'has long been recognized as property.'" 531 U.S. at 23. The defendants in *Carpenter* were not alleged to have deprived the State of the power to control how its money was spent, but merely to have lied in obtaining a license. In the present case, the defendants' conduct deprived the City of the power to control how its money should be spent. Under the minority set-asides established in the Ordinance, the City made it unmistakably clear how it wanted its money spent, and defendants' conduct, if true, thwarted the City's legislative intent. By allegedly falsely representing the identity of owners and management in Duff family businesses, defendants are accused of causing over a hundred million dollars in City money to go to businesses that were neither MBE's or WBE's.

Defendants' attempt to distinguish other cases cited by the government is unavailing. *United States v. Shyres*, 898 F.2d 647 (8th Cir), *cert. denied*, 498 U.S. 821 (1990), followed *McNally* in holding that the right to control spending is a property right within the purview of § 1341. *Shyres*, 898 F. 2d at 652. The purported distinction of *United States v. Fagan*, 821 F.2d 1002, (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), on the ground that it was decided before *McNally* and did not take into consideration McNally's "property" requirement, is also incorrect. The *Fagan* opinion was prepared prior to the release of the *McNally* opinion, but the Fifth Circuit took pains to demonstrate, prior to its

publication, that it was consistent with *McNally*. *Fagan*, 821 F.2d at 1010-11 n.6.[1]

II.

Defendants also argue that the City suffered no actual loss, because the indictment does not charge that the Duff-owned companies gave less than full value in providing their services. They characterize *United Sates v. Granberry*,

---

[1]Defendants' citations to the opinions of other courts of appeals and district courts which, allegedly, support their position are also unpersuasive. None of those cases involved a scheme to defraud the victim of power over how its money should be spent. *United States v. Ashman*, 979 F. 2d 469, 479 (7th Cir. 1992), held that a failure by the Chicago Board of Trade to execute trades by public outcry was not a deprivation of property, because the buyers would not have received any more money had the commodity bidding been done in the open pit. In *United States v. Bruchhausen*, 917 F. 2d 464 (9th Cir. 1992), convictions for wire fraud were reversed because the rights of the United States to pursue forfeiture remedies and of manufacturers to control the resale of their products to parties prohibited by law from purchasing the products, were held not to be property interests of those parties that would qualify under the *McNally* standard. There was no basis in *Bruchhausen* for an allegation that the defendant had deprived any victim of power over how its money would be spent. The same is true of *United States v. F.J. Vollmer & Company, Inc.*, 1 F.3d 1511, 1520-21 (7th Cir. 1993) (interest of the United States in preventing the unlawful disposition of weapons was regulatory and not property within the meaning of *McNally*).

908 F.2d 278 (9th Cir. 1990) as "not helpful" to the government and argue further that "*Granberry* provides no authority for the Court here" (Defendants' Reply Memorandum 7 n.4). In *Granberry*, the defendant had obtained employment with a Missouri school district as a school bus driver by deliberately concealing his prior conviction for murder. The indictment alleged that this deception caused the State and the School District to be deprived of ten separate types of money or property, all in violation of § 1341. The Eighth Circuit held that the types of property described in charges B 1-3 of the *Granberry* indictment, which all involved either the State's processing of employment applications or the control of distribution of school bus driving permits did not constitute "property" within the meaning of § 1341 but were strictly regulatory in nature. However, the Eighth Circuit found that Item (A) (1), "Money from the Normandy School District in the form of wages" fell "within the narrowest reading of the ["property" clause] of the statute." *Granberry*, 908 F.2d at 279-280. Other items which the court held were essentially the school district's "property" within the meaning of the Act were the following: the exclusive control of the distribution of a limited number of school bus driving jobs, the exclusive control of how its money is spent, the exclusive control of who the school district hired, and the school district's control over the persons and type of persons with whom it decided to enter employment agreements.

The *Granberry* defendant also argued that the school district did not lose any money, since it sought and hired a competent driver. The Eighth Circuit disagreed, holding

> What the School District wanted was a competent schoolbus driver who was truthful and had not been convicted of a felony, and this is not what it got. The School District has been deprived of money in the very elementary sense that its money had gone to a person who would not have received it if all the facts had been known.

Granberry, 908 F.2d at 280. Thus, *Granberry* not only follows *McNally* in holding the right to control how one's money is spent is a property right cognizable under § 1341, it also rejects the notion that one may avoid the sweep of the Section by showing that the victim received market value for its money.

The assertion that the businesses owned and controlled by Mr. Duff performed satisfactorily under the contracts obtained by them through fraud is not a defense to the indictment. *Ranke v. United States*, 873 F.2d 1033, 1038 (7th Cir.1989).

III.

Defendants contend that the sub-contracts between the Duff owned businesses they allegedly falsely represented as qualified for set-asides and Waste Management do not

support the § 1341 charge of Count Two. Here, they again read *McNally* incorrectly, arguing that since the City made no direct payments to a Duff-owned business under the sub-contracts, the City has not sustained the monetary or pecuniary loss, which they say *McNally* requires. As I have already noted, however, under *McNally* pecuniary injury or loss is not an essential element of a § 1341 offense.

Further, using innocent third parties to effect a scheme to defraud does not shield the perpetrator from criminal penalties. Defendants argue that cases relied upon by the government for this proposition arose under the statute generally governing conspiracy against the government (18 U.S.C. § 371) which has a broader sweep than § 1341 (See, e.g., *United States v. Barker Steel Co.*, 985 F.2d 1123 (1st Cir. 1993)), but this purported distinction does not make the cases any less persuasive on the issue of third party involvement.

IV.

Defendants ask that Counts Nine Through Fifteen be dismissed on the ground that all of the mailings of checks from the City described in those counts were to third party general contractors Waste Management, Tishman or APMG; that none was a use of the mails to further a scheme, and that the mailings would have occurred regardless of defendants' conduct.

The defendants' alleged scheme was a continuing one that lasted through the 1990's. The core element of the scheme was the masquerade of Duff-owned and controlled businesses

as MBE's and WBE's, which allowed those entities to gain, fraudulently, large fees as sub-contractors of the general contractors to which the checks were mailed. Under §1341, a mailing will be considered in furtherance of a scheme to defraud if it is incidental to an essential part of the scheme. United States v. Fernandez, 282 F.3d 500, 507 (7th Cir. 2002). If the City had not mailed checks to the prime contractors, defendants' entities would have gained nothing from their alleged fraudulently obtained status as qualified sub-contractors. See *United States v. Dacri*, 827 F.Supp. 550, 555 (E.D. Wis. 1993).

V.

Defendants' final argument is that where counts alleging "specified unlawful activity" are dismissed, money-laundering charges related to the proceeds of such activity must also be dismissed. On this basis alone, defendants assert, counts 24-30 of the indictment cannot stand. Since I decline to dismiss any of the prior counts of the indictment on which the money-laundering charges are based, this argument is moot.

CONCLUSION

For the foregoing reasons, I deny the defendants' motion to dismiss in its entirety.

ENTER ORDER:

/s/ Elaine E. Bucklo

Elaine E. Bucklo

United States District Judge

Dated: September 21, 2004

18 U.S.C § 1341 (2002)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Relevant Application Notes to U.S.S.G. § 2B1.1

Application Note 3(A)(i)

"Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense."

Application Note 3(A)(iii)

"Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm."

Application Note 3(B)

"Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."

Application Note 3(F)(ii)

"Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50."

FILED
APR 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1347

In the Supreme Court of the United States

JAMES M. DUFF, WILLIAM E. STRATTON, AND TERRENCE DOLAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 06-1347

JAMES M. DUFF, WILLIAM E. STRATTON, AND TERRENCE DOLAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

Petitioner contends that, on review pursuant to United States v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of sentencing procedure under *Booker*, including, in *Rita*, whether it is consistent with *Booker* to accord a presumption of reasonableness to within-Guidelines sentences. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution

of *Claiborne* and *Rita*, and then disposed of as appropriate in light of the decisions in those cases.*

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

---

* The government waives any further response to the petition unless this Court requests otherwise.

(3)

No. 06-1347

In the Supreme Court of the United States

JAMES M. DUFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners violated the federal mail-fraud statute, 18 U.S.C. 1341, when they fraudulently procured money by misrepresenting their eligibility to participate in the City of Chicago's affirmative action contracting program.

2. Whether the court of appeals properly accorded a presumption of reasonableness to the sentence imposed by the district court, which was within the applicable range under the Sentencing Guidelines.

3. Whether the courts below properly applied the Sentencing Guidelines in determining that the offenses in this case resulted in a "loss" to the City.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 500 U.S. 344 (1991) 13
Carpenter v. *United States*, 484 U.S. 19 (1987) 9
Cleveland v. *United States*, 531 U.S. 12 (2000) 7, 8
McNally v. *United States*, 483 U.S. 350 (1987) 4, 7
Rita v. *United States*, 127 S. Ct. 2456 (2007) 12
United States v. *Brothers Constr. Co. of Ohio, Inc.*, 219 F.3d 300 (4th Cir.), cert. denied, 531 U.S. 1037 (2000) 13
United States v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992) 11, 12
United States v. *Evans*, 844 F.2d 36 (2d Cir. 1988) 10
United States v. *Mittlestaedt*, 31 F.3d 1208 (2d Cir. 1994), cert. denied, 513 U.S. 1084 (1995) 9, 10
United States v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) 10, 11
United States v. *Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 489 U.S. 1066 (1989) 11

Statutes and guidelines: Page

18 U.S.C. 1341 ..... 2, 4, 7
18 U.S.C. 1346 7
U.S. Sentencing Guidelines:
§ 2F1.1 (1998) 6
§ 2F1.1, comment. (n. 8(d)) (1998) 6

In the Supreme Court of the United States

No. 06-1347

JAMES M. DUFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B55) is reported at 464 F.3d 773. The opinion of the district court denying petitioners' motion to dismiss the indictment (Pet. App. H4-H15) is reported at 371 F. Supp. 2d 959. The opinion of the district court on sentencing of petitioner Duff (Pet. App. D24-D36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2006. A petition for rehearing was denied on January 8, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Duff and Dolan pleaded guilty to, *inter alia*, mail fraud, in violation of 18 U.S.C. 1341. Pet. App. B18-B19, D1-D2. Duff was sentenced to 118 months of imprisonment and was ordered to pay restitution in the amount of $12,026,582.02. *Id.* at B19, D3, D9. Dolan was sentenced to 21 months of imprisonment. *Id.* at B19. Petitioner Stratton was found guilty by a jury of, *inter alia*, mail fraud. *Id.* at B18-B19. He was sentenced to 70 months of imprisonment and was ordered to pay $7,370,739 in restitution. *Id.* at B19. The court of appeals affirmed petitioners' convictions and sentences. *Id.* at B1-B55.

1. Petitioners and several other defendants engaged in "successful schemes to cheat the City of Chicago out of funds slotted for minority- and women-owned businesses and to swindle various workers compensation insurance providers out of proper premiums." Pet. App. B1. In order to participate in the City's women-owned business enterprise (WBE) program, Duff installed his mother, Patricia Green Duff, as the sole shareholder of Windy City Maintenance (WCM), even though "she had no real involvement with the business." *Id.* at B4. For many years, corporate officers of WCM, including Dolan, submitted renewal applications for the program "that reiterated the false description of [Patricia] Green Duff's role" in the company. *Id.* at B5-B6. As a result, WCM was able to obtain WBE certification throughout the 1990s, thereby obtaining City contracts that it could not otherwise have received. *Id.* at B6. WCM received $37,512,279 from those contracts. *Ibid.*

Duff employed a similar scheme to obtain minority-owned business enterprise (MBE) certifications for another company that he controlled, Remedial Environ-

mental Manpower (Remedial). Pet. App. B4-B5. Duff established Stratton, an African-American male, as the nominal majority owner of Remedial. *Ibid.* After the City denied Remedial's initial request for MBE certification, the company "submitted an entirely new application that reported Stratton was the sole owner of the business and that removed all of the troubling references to Duff and his companies." *Id.* at B8. The City granted that application. *Ibid.* After becoming a City-certified MBE company, Remedial obtained approximately $74,849,310 in contracts and subcontracts through the City's MBE program. *Ibid.*[1]

2. In a 33-count indictment filed in 2003, petitioners and several co-defendants were charged with violations of the federal racketeering, mail-fraud, wire-fraud, money-laundering, and tax statutes. Pet. App. B18-B19. Petitioners (along with defendant Patricia Green Duff) moved to dismiss the mail-fraud and money-laundering charges as they pertained to the WBE and MBE schemes. *Id.* at H4-H6. The district court denied that motion. *Id.* at H4-H15.

The mail-fraud statute establishes criminal penalties for any person who uses the mails to effectuate a

---

[1] In another fraudulent scheme, Windy City Labor Services (Windy Labor), which was also controlled by Duff, obtained workers compensation insurance from a risk pool established by the State of Illinois. Pet. App. B10-B18. Duff kept Windy Labor's insurance premiums artificially low "by making what would turn out to be massive and long-term misrepresentations," falsely representing that a high percentage of Windy Labor's employees were "clerical" workers. *Id.* at B13. As a result of the "extensive scheme to hide the true nature of Windy Labor's business, the company paid approximately $1.09 million less in premiums than it should have." *Id.* at B18. The petition for a writ of certiorari does not challenge the application of the mail-fraud statute to that scheme.

"scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), petitioners contended that the City's interest in the WBE and MBE programs was "purely regulatory" and could not be deemed "property" within the meaning of Section 1341. Pet. App. H7. The district court rejected that argument. The court explained that, whereas "no moneys of the state were involved" in *McNally* or in the subsequent cases on which petitioners relied, petitioners were accused of "falsely representing the identity of owners and management in Duff family businesses" and thereby "causing over a hundred million dollars in City money to go to businesses that were neither MBE's or WBE's." *Id.* at H7, H9.[2]

3. Duff and Dolan pleaded guilty to all counts against them. Pet. App. B19. Four other defendants, including Stratton, proceeded to trial. *Ibid.* The jury returned guilty verdicts as to all defendants except for Starling Alexander, a Remedial supervisor "who was only tangentially involved in the scheme." *Ibid.*

In determining Duff's sentence, the district court took into account the amount of the "loss" to the City of Chicago that resulted from WCM's fraudulent participation in the WBE program. See Pet. App. D27-D29. The

---

[2] Petitioners also sought dismissal of the money-laundering charges in the indictment. Petitioners argued that, because the alleged "specified unlawful activity" underlying those charges was mail fraud, and the charged conduct did not constitute a violation of the mail-fraud statute, the money-laundering charges could not stand. See Pet. App. H14. Because the district court rejected petitioners' challenges to the mail-fraud allegations, the court likewise denied petitioners' motion to dismiss the money-laundering counts. *Ibid.*

government contended that the amount of the loss was $112,406,850 (the total monies received by the company under the relevant contracts), while Duff "contended that his company performed the work under the contract and that therefore there was no loss at all." *Id.* at D27. The district court adopted an intermediate position, holding that the relevant "loss" was the company's "profit on the contracts" and "calculat[ing] the profit as $10,933,000." *Id.* at D28, D29.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. B1-B55.

a. As in the district court, petitioners contended on appeal that their conduct was not encompassed by the mail-fraud statute because "the only loss Chicago suffered was to its regulatory interests." Pet. App. B21. The court of appeals rejected that contention, explaining that petitioners had "hatched and executed a plan to obtain fraudulently over $100 million in contracts and subcontracts from the city of Chicago by lying about the [WCM] and Remedial ownership structure." *Id.* at B23. The court found that petitioners' scheme did not simply deprive the City of "intangible" rights, but rather "precisely and directly targeted Chicago's coffers," and was thus "committed both against Chicago as regulator and also against the city as property holder." *Id.* at B25; see *ibid.* (explaining that the object of petitioners' fraudulent scheme "was money, plain and simple, taken under false pretenses from the city in its role as a purchaser of services").

The court of appeals further explained that, although the City of Chicago received the cleaning and janitorial services for which it had contracted, the City "completely lost the other type of services for which it was paying the contractors and the Duff companies—ser-

vices performed by an MBE or an WBE precisely because the company is a qualified MBE or WBE." Pet. App. B26. The court noted in that regard that "Chicago was aware that the services rendered by the MBEs or WBEs would not be the most efficient or the lowest-priced possible," and that the City "was willing to pay these premiums" in order to encourage the development of such enterprises. *Id.* at B27 n.3. For that reason, the court explained, "an efficient, established business, given the advantage of MBE/WBE status, would earn more than it would normally receive under a truly open bidding system, in which it would compete against similarly established companies with the same experience and efficiencies of scale." *Ibid.*

b. The court of appeals held that the district court had properly considered the "loss" to the City in calculating Duff's sentence, and it rejected Duff's contention that the amount of the relevant loss was zero. Pet. App. B29-B31. The court concluded that, pursuant to former Sentencing Guidelines § 2F1.1, comment. (n. 8(d)) (1998), which governed wrongful acquisition of government benefits, the district court should have used the full amount of payments received rather than the company's profit as the amount of that loss. Pet. App. B30-B31. The court declined to order a remand on that ground, however, both because the government had not cross-appealed and because use of the higher figure would not affect Duff's sentence. *Id.* at B31.

c. The court of appeals also rejected Duff's contention that his sentence was unreasonable. Pet. App. B36-B37. Because the sentence was within the range established by the Sentencing Guidelines, the court of appeals treated that sentence as "presumptively reasonable." *Id.* at B36. The court concluded that the district court

had "adequately explained the reasons for its sentence," *ibid.*, and had provided "a thoughtful and meaningful analysis regarding why Duff's crimes merited 118 months of imprisonment," *id.* at B37.

ARGUMENT

1. Petitioners contend (Pet. 6-20) that the conduct in which they engaged did not violate the mail-fraud statute, 18 U.S.C. 1341, because it did not deprive Chicago of "money or property." That contention lacks merit and does not warrant this Court's review.

a. Contrary to petitioners' contention (Pet. 8-11), the court of appeals' ruling in this case is consistent with this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Cleveland* v. *United States*, 531 U.S. 12 (2000). In *McNally*, the Court rejected the "intangible rights" theory of mail-fraud prosecution, holding that the mail-fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. *McNally*, 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360.[3]

In *Cleveland*, the defendants were charged with using false statements to obtain video poker licenses from the State of Louisiana. See 531 U.S. at 15. The Court held that the defendants' conduct was not covered by Section 1341. *Id.* at 20-27. The Court acknowledged that "video poker licensees may have property interests

---

[3] Shortly after this Court's decision in *McNally*, Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail- and wire-fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." See *Cleveland*, 531 U.S. at 19-20.

in their licenses," but found it dispositive that "the license is not property in the hands of the State." *Id.* at 25. The Court "conclude[d] that § 1341 requires the object of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under § 1341." *Id.* at 26-27.

Petitioners argue that this case is comparable to *McNally* and *Cleveland* because the effect of their conduct was "to deprive the City of its regulatory interest in promoting its MBE/WBE set-aside program through the spending of its funds to promote that interest." Pet. 9. Yet the very phrasing of that claim shows why the court of appeals rejected it. See Pet. App. B23-B25. Petitioners successfully defrauded the city "of its funds" (Pet. 9) rather than of a regulatory interest (such as the licenses at issue in *Cleveland*) not amounting to a property right. As the court of appeals correctly held, petitioners' scheme fell within the mail-fraud statute because they fraudulently obtained "money, plain and simple," using false pretenses to obtain funds "from the city in its role as a purchaser of services." Pet. App. B25.

Petitioners further contend (Pet. 8, 10) that, because their companies performed the relevant services as specified in the contracts, the City suffered no "pecuniary loss" or "economic harm." As the court of appeals recognized, however, the City did not in fact receive the benefit of its bargain because petitioners' misrepresentations frustrated the achievement of one of the City's purposes in spending the money—*i.e.*, to foster the development of minority- and women-owned businesses. See Pet. App. B26, B27 n.3. The City presumably could have procured the same services more cheaply had it not wished to encourage the growth of minority- and women-owned businesses, and it therefore did not re-

ceive everything it paid for when petitioners fraudulently diverted the City's payments to themselves. See *ibid.* The City was therefore defrauded of its money or property.[4]

b. Petitioners contend (Pet. 12-20) that a circuit conflict exists on the question whether the City's "right to control [its] spending" is a "property" interest for purposes of the mail-fraud statute. The cases on which petitioners rely are distinguishable, however. Unlike the instant prosecution, none of those cases involved fraud directed at an MBE, WBE, or similar program, and none involved a scheme whose purpose and effect was to divert the victim's funds to expenditures that did not fully accomplish the objectives of the relevant spending program.

In *United States* v. *Mittlestaedt*, 31 F.3d 1208 (2d Cir. 1994), cert. denied, 513 U.S. 1084 (1995) (see Pet. 12-13), a consultant to two local communities concealed his interest in real estate projects that he influenced local boards to favor. The court of appeals held that the consultant's failure to disclose his interest did not con-

---

[4] That the City was defrauded of its money or property is further confirmed by this Court's holding in *Carpenter* v. *United States*, 484 U.S. 19 (1987). There, the Court concluded that the term "property" in Section 1341 is not limited to tangible property, but also encompasses intangible property such as "confidential business information." *Id.* at 25. The Court also held that Section 1341 does not require proof of "a monetary loss, such as giving the information to a competitor"; rather, "it [was] sufficient that the [victim] ha[d] been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26-27. It follows *a fortiori* that petitioners' scheme, which diverted *tangible* property to an ineligible recipient, thereby preventing the City from using the funds to achieve the full range of its contracting objectives, is covered by the statute.

stitute mail fraud "unless the omission can or does result in some tangible harm." *Id.* at 1217. Because the instructions given at trial "effectively permitted the jury to convict [the defendant] for nothing other than a breach of fiduciary duty," *id.* at 1218, the court of appeals reversed. Here, in contrast, petitioners' deception harmed the City financially because, "[a]s the government clearly stated at oral argument, Chicago was aware that the services rendered by the MBEs or WBEs would not be * * * the lowest-priced possible," but the City was willing to pay a premium to help build minority- and women-owned businesses. Pet. App. B27 n.3.

The government's allegations that Chicago was fraudulently induced to make expenditures that did not fully serve the City's objectives similarly distinguishes the present case from *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988) (see Pet. 13-14). In that case, Evans was charged with scheming to deceive the government about the true end-users of arms to be purchased by foreign governments. The court concluded that the government's interest in "prohibiting a particular use of a commodity that the government does not use or possess [*i.e.*, the arms sold to and owned by foreign countries] ordinarily does not create a property right." *Id.* at 42. Here, in contrast, the government did not seek to impose restraints on the resale of a commodity it had sold; rather, the mail-fraud statute was applied to a scheme to defraud the City of the benefit of its bargain.

In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) (see Pet. 13), the defendants engaged in aggressive sales pitches to private customers. The court reversed the defendants' mail-fraud convictions because the defendants' "agents did not attempt

to deceive their prospective customers with respect to the bargain they were offering." *Id.* at 1182. Here, by contrast, petitioners deceived the City into believing that its contractual payments would serve to foster minority- and women-owned businesses—an objective for which the City was willing to pay a premium.

The Third Circuit's decision in *United States* v. *Zauber*, 857 F.2d 137 (1988), cert. denied, 489 U.S. 1066 (1989) (see Pet. 14), is also inapposite. The defendants in *Zauber* were convicted of pre-*McNally* mail- and wire-fraud counts that charged them with depriving a union pension fund of the right to honest services by its employees. *Id.* at 143. Applying this Court's intervening *McNally* decision, the Third Circuit said that it would "not strain to interpret a defective indictment as implicitly alleging that the kickback scheme's purpose was to deprive the pension fund beneficiaries of money." *Ibid.* In contrast, the mail- and wire-fraud counts in the indictment in the present case did allege that petitioners and others engaged in a scheme to obtain money, specifically "to obtain fraudulently over $100 million in contracts and subcontracts." Pet. App. B23.

Petitioners' reliance (Pet. 14-15) on *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), is likewise misplaced. The defendants in *Bruchhausen* devised and executed a scheme to purchase American technology and to smuggle it to Soviet-bloc countries. See *id.* at 466. Although representatives of the American manufacturers who had sold the defendants the technology testified that they would not have entered into the transactions if they had known the ultimate destination of the goods, see *ibid.*, the court held that the manufacturers had not been defrauded of "property" within the meaning of the mail-fraud statute, see *id.* at 467-468. The court ex-

plained that, although a "manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, * * * that interest *in the disposition of goods it no longer owns* is not easily characterized as property." *Id.* at 468 (emphasis added). Here, by contrast, the harm to Chicago was not that the contractual payments petitioners received were subsequently disbursed in ways that the City found objectionable. Rather, petitioners' scheme frustrated the full achievement of Chicago's contracting purposes by inducing the City to pay money to companies whose participation in the program did not further the City's objective of fostering minority- and women-owned businesses.

2. Petitioners contend (Pet. 21-24) that the court of appeals erred in treating the sentences imposed by the district court, which were within the applicable ranges under the Sentencing Guidelines, as "presumptively reasonable." Pet. App. B36. After the petition was filed, this Court issued its decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007). The Court in *Rita* held that a court of appeals may apply a presumption of reasonableness in reviewing a within-Guidelines sentence. See *id.* at 2462-2468. In light of that decision, petitioners' challenge lacks merit and does not warrant review.

3. Petitioners contend (Pet. 24-26) that the courts below erred in concluding that petitioners' offenses caused a "loss" to the City within the meaning of former Sentencing Guidelines § 2F1.1 (1998). Petitioners appear to argue (see Pet. 25) that, because the "loss" Guideline is limited to crimes involving "pecuniary harm" to the victim, any impairment of the City's efforts to foster minority- and women-owned businesses would not trigger the Guideline. That argument lacks merit and does not warrant this Court's review.

Petitioners' scheme caused the City to pay more than $100 million to companies that were not eligible to receive the funds. The existence of a "loss" to the City is particularly apparent in light of Chicago's willingness to pay "premiums" (Pet. App. B27 n.3) in order to achieve the full range of its contracting objectives, *i.e.*, to support and foster MBEs and WBEs. In any event, petitioners do not contend that a circuit conflict exists on this question. And, to the extent that the applicability of the relevant Guideline to cases like this one requires clarification, the Sentencing Commission rather than this Court is the body primarily entrusted with that task. See *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991).

Petitioners further contend (Pet. 26-29) that the court of appeals erred in determining, under the application note covering wrongful acquisition of "government benefits," that the "loss" to the City was equal to the full amount of the contractual payments (more than $100 million) that petitioners' companies received, rather than to the profit ($10,933,000) that petitioners realized on those contracts. See Pet. App. B29-B31, D27-D29, J1. The Seventh Circuit's holding is correct and (as petitioners acknowledge, see Pet. 26-27) is consistent with the only other court of appeals decision to address the question. See *United States* v. *Bros. Constr. Co. of Ohio, Inc.*, 219 F.3d 300, 317-318 (4th Cir.), cert. denied, 531 U.S. 1037 (2000). The court of appeals' determination that the higher loss figure should have been applied, moreover, did not affect the sentence that was ultimately imposed. See Pet. App. B31. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

AUGUST 2007

64

(4)

Nº. 06-1347

FILED
AUG 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JAMES M. DUFF,
WILLIAM E. STRATTON,
AND
TERRENCE DOLAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

Terence H. Campbell
COTSIRILOS, TIGHE & STREICKER
33 North Dearborn, Suite 600
Chicago, Illinois 60602

(312) 263-0345

Counsel of Record for Petitioner James M. Duff

August, 2007 *See Reverse Side for Additional Counsel of Record*

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

Michael D. Sher
NEAL, GERBER & EISENBERG, LLP
Two North LaSalle Street, Suite 2300
Chicago, Illinois 60602

(312) 269-8085

Counsel of Record for Petitioner William E. Stratton

Thomas Anthony Durkin
DURKIN & ROBERTS
53 West Jackson Boulevard, Suite 615
Chicago, Illinois 60604

(312) 981-0123

Counsel of Record for Petitioner Terrence Dolan

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

In its Brief in Opposition ("Govt. Br."), the government contends that petitioners committed mail fraud because the City did not receive all for which it bargained and, as a result, was deprived of its money or property. In the eyes of the government, and the court of appeals below, although the City received all of the services "for which it had contracted, the City 'completely lost the other type of services for which it was paying ... – services performed by an MBE or an WBE precisely because the company is a qualified MBE or WBE.' Pet. App. B26." (Govt. Br. 5-6.) Rather than demonstrating why review of the judgment below should be declined, this argument highlights the compelling need for that review. The government's argument and the holding of the court of appeals rest on the insupportable proposition that mail fraud is committed even where the City – the putative victim of petitioners' scheme – paid not a penny more than it contracted to pay and where the only "loss" is the frustration of the City's regulatory interests.

The government fails to distinguish this case from this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), and fails to address in any meaningful way the conflict among the Circuits on the issue of whether the "right to control spending" constitutes "money or property" under the federal mail fraud statute, 18 U.S.C. § 1341. In addition, the Seventh Circuit's decision is in direct conflict with the directives of the Sentencing Guidelines regarding what

constitutes "loss" under the fraud Guidelines. For all of these reasons, the decision of the Seventh Circuit should be reviewed by this Court.

Arguing that petitioners' scheme simply was intended to obtain the City's money through deception, the government suggests in its Brief in Opposition that this is just another run-of-the-mill mail-fraud case, not deserving of review by this Court. On the contrary, and as acknowledged by the government, the record below conclusively demonstrates that WCM and REM provided all of the services which they contracted to perform and that neither the City nor Waste Management paid (or could have paid) more for those services as a result of petitioners' scheme. While WCM received City funds, this resulted in no pecuniary loss to the City because it received the janitorial services for which it had contracted and paid. Moreover, the City paid nothing at all to REM in connection with the City's four waste-recycling contracts with Waste Management. The terms and structure of those contracts, which were fixed years before REM even became Waste Management's sub-contractor, provided for payment by the City to Waste Management based upon fixed unit prices which were unaffected by the REM sub-contract. (Pet. 3.) Therefore, any payments made by the City could not possibly have been affected by any deception in which petitioners engaged in connection with REM's MBE certification. The City neither suffered nor could suffer any

pecuniary injury resulting from petitioners' conduct. The City paid Waste Management not a penny more than it originally contracted to pay, nor did WCM receive more than the amounts prescribed by its contracts with the City.[1]

While the government, like the Seventh Circuit below, acknowledges that petitioners "performed the relevant services as specified in the contracts," it argues nevertheless that the City did not receive all of the services for which it contracted because its expenditures did not "achieve the full range of its contracting objectives." (Govt. Br. 8, 9 fn. 4.) The government asserts that "the City did not in fact receive the benefit of its bargain because petitioners' misrepresentations frustrated the achievement of one of the City's purposes in spending the money – i.e., to foster the development of minority- and women- owned businesses." (Govt. Br. 8.) That the City may not have achieved "one of the City's purposes in spending the money" is not the same as failing to receive the services for which it contracted at the prices it contracted to pay. The government's argument

---

[1]While the government repeatedly refers to the "premiums" that the City was willing to pay to promote the development of MBEs and WBEs (Govt. Br. 6, 8-9, 10, 11, 13), there is no support in the record below for this proposition aside from the lone passing remark at oral argument by the government's counsel. Apx. B-27-B-28.

simply treats the identity of the contractor – the party providing the services – as part of the "services" for which the City contracted, which it obviously is not. The City was not deprived of property, nor was it petitioners' intention to do so. All that the City lost was the advancement of its regulatory objective – fostering "the development of minority- and women-owned businesses." (Govt. Br. 8.) Loss of that objective, involving what some of the cases refer to as the "right to control spending," is not a loss of money or property, and a scheme which seeks merely to deprive another of that objective does not, therefore, involve the intended deprivation of money or property required for a Section 1341 conviction under *McNally*.

The circuits are divided on this issue; the Seventh and Eight Circuits recognize the right to control spending as a property interest under Section 1341, while the Second, Third and Ninth Circuits do not. (Pet. 12.) Instead of addressing this genuine conflict among the circuits, the government attempts to distinguish certain of the cases cited by petitioners on the basis that none of those cases "involved fraud directed at an MBE, WBE, or similar program, and none involved a scheme whose purpose and effect was to divert the victim's funds to expenditures that did not fully accomplish the objectives of

the relevant spending program." (Govt. Br. 9.)[2] Such claimed "distinctions" of the cases cannot obscure the genuine conflict among the circuits on the central issue presented by this case. Whether a governmental entity's "right to control its spending" is a property interest under Section 1341 as construed by *McNally*, is a fundamental issue on which the circuits disagree. This is an important issue of federal criminal law involving a statute widely used by federal prosecutors, with wide-ranging implications. This Court should resolve that conflict.

Finally, the government contends that simply because petitioners' scheme resulted in contracts being awarded to companies that were not properly qualified as W/MBE's - and even though all the work was performed, in exemplary fashion, and at the lowest available price – there was still a pecuniary "loss" to the City under the fraud Guidelines. This

---

[2] As did the Seventh Circuit below, the government fails even to mention the opinion of the Eighth Circuit in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), which was the cornerstone of the government's successful response to petitioners' motion to dismiss from the indictment the mail-fraud counts. The government also fails to address *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), which held that the frustration of a right to control spending is not a violation of Section 1341, even where the victims made payments to the defendants as a result of the scheme.

cannot be so. The Guidelines are unambiguous that in order to have a "loss" under the fraud Guidelines, there must be "pecuniary harm" to the victim (here the City). The Guidelines further make clear that "'Pecuniary harm' means harm that is *monetary*." (U.S.S.G. §2B1.1, App.n 3 (Nov. 2006 ed.) (emphasis added). Here, there was absolutely no pecuniary harm to the City, as it received all of the services for which it contracted at the lowest possible cost, pursuant to competitive bidding, and all those services were, by all accounts, well-performed. Again, while the City may have been deprived of its "regulatory" or "legislative" interest in fostering W/MBE's, it clearly did not suffer any "pecuniary harm."

The government next argues that *certiorari* is not warranted because "to the extent that the applicability of the relevant Guideline to cases like this one requires clarification, the Sentencing Commission rather than this Court is the body primarily entrusted with that task." (Govt. Br. 13.) This, too, misses the mark. Petitioners do not claim that "clarification" is needed; rather petitioners seek this Court's review because the Seventh Circuit's holding is in direct contravention of the clear directive of the Guidelines as discussed above and in the Petition.

CONCLUSION

For the reasons stated above, as well as in their original Petition, a writ of *certiorari* should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,
TERENCE H. CAMPBELL
COSTSIRILOS, TIGHE & STREICKER
33 N. Dearborn, Suite 600
Chicago, Illinois 60602
Counsel for Petitioner Duff

MICHAEL D. SHER
NEAL, GERBER & EISENBERG, LLP
Two North LaSalle Street, Suite 2300
Chicago, Illinois 60602
Counsel for Petitioner Stratton

THOMAS ANTHONY DURKIN
DURKIN & ROBERTS
53 W. Jackson Boulevard, Suite 615
Chicago, Illinois 60604
Counsel for Petitioner Dolan